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MIDDLE TEMPLE L...
WITHDRAWN STOCK

A

SELECTION

OF

PRECEDENTS,

FROM THE

BEST MODERN MANUSCRIPT COLLECTIONS,

AND

Drafts of Actual Practice;

WITH

GENERAL COMMON FORMS AND VARIATIONS

ADAPTED TO ALL THE CIRCUMSTANCES USUALLY OCCURRING;

FORMING A

SYSTEM OF CONVEYANCING;

WITH

DISSERTATIONS, AND PRACTICAL NOTES.

132/51A

BY

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OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

IN CONTINUATION OF THE WORK OF THE LATE

W. M. BYTHEWOOD, Esq.

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ERRATA ET ADDENDA.

Page 226, *second line from the bottom, instead of the words* "bargain and sale," *substitute* "surrender."

Page 228, *add at the end of the last line, the following paragraph*—

Since the preceding note was written, the new bankrupt act (1 & 2 Wm. 4, c. 56) has passed. That act (sect. 26) provides, that "where any person shall have been adjudged a bankrupt, all such present and future real estate of such bankrupt, whether in the United Kingdom of Great Britain and Ireland, or in any of the dominions, plantations, or colonies, belonging to his Majesty, as by the said recited act is directed to be conveyed by the commissioners to the assignees, shall vest in such bankrupt's assignee or assignees for the time being, by virtue of his or their appointment, without any deed of conveyance for that purpose; and as often as any such assignee or assignees shall die or be lawfully removed or displaced, and a new assignee or assignees shall be duly appointed, such of the aforesaid real estate as shall remain unsold or unconveyed, shall, by virtue of such appointment, vest in the new assignee or assignees, either alone or jointly with the existing assignees, as the case may require, without any conveyance for that purpose."

This section, it is clear, does not embrace copyholds, because they are not by the act of 6 Geo. 4, c. 16, "*directed to be conveyed by the commissioners to the assignees;*" and as there is no other provision in the act of 1 & 2 Wm. 4, directly applicable to them, it should seem, either that copyholds were inadvertently lost sight of by the framers of the act, or that it was considered that they were sufficiently provided for by the existing law. Of course, the latter is to be presumed, if the enactments leave undisturbed the powers which, under the prior act, the commissioners possessed over copyholds; or rather, if they transfer these powers to the new commissioners; and such, it is submitted, is the fair construction of them; for the seventh section of the act expressly authorizes any one or more of the six commissioners, appointed pursuant to the new act, to exercise the same powers and authorities, except as to commitments, as were possessed by commissioners under the previously existing act; and the twelfth section provides, that the persons to be appointed commissioners in fiats under the new enactment, shall have the like power and authority

as if they were appointed special commissioners, by virtue of a commission under the great seal. Now, although the former section is confined to the six commissioners, and therefore, in terms, does not embrace country commissions; and although the latter does not expressly vest in the commissioners appointed by the fiats the powers of the commissioners under the former act; yet it is apprehended that the effect of the whole act is to invest the new commissioners of both classes with all the powers possessed by the former commissioners; and one of these powers being, that of "making sale" of copyholds, they have succeeded to this with the other authorities of their predecessors. The precedent in the text, therefore, is still applicable, with the variations rendered necessary by the change in the constitution of the commissioners' and assignees' authority.

Page 355, *at the end of the first paragraph, insert as follows:*—In *Cocker* v. *Quayle*, 1 Russ. & Myl. 535, trustees were empowered, with the written consent of the wife, to lend trust-money to the husband upon his bond. They lent it to him with her consent, but without taking his bond; and he having become bankrupt, the trustees were held to be responsible for the loss.

Page 410, *line* 21, *after the word* satisfaction, *add* "*Willoughby* v. *Backhouse*, 4 Dowl. & Ryl. 539; *S. C.* 2 Barn. & Cress. 821; *Baylis* v. *Usher*, 4 Moo. & Pay. 791."

Page 414, *add at the end of the last paragraph,* "See also Lord *Southampton* v. *Brown*, 6 Barn. & Cres. 718, *ante*, Vol. 5, p. 117."

Page 485, *omit lines* 26, 27, 28, 29, *and* 30, *except the word* "whereas" *at the commencement of the* 26*th, and the words* "by inden-," *at the end of the* 30*th.*

PRECEDENTS

IN

CONVEYANCING.

PURCHASE DEEDS—(*continued*).

RELEASE *by a* TENANT *for* LIFE, *in Consideration of an Annuity secured on the Premises. (The Purchaser having the next Estate for Life in Remainder, the Premises are conveyed to a Trustee, to prevent Merger)* (*a*). BY TENANT FOR LIFE, IN CONSIDERATION OF A RENT-CHARGE.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the first part; [*purchaser*], of Parties.

(*a*) Merger is that operation of law by which, when several estates coincide and meet in the same person or persons, one of those estates becomes extinguished or annihilated in the other. In order to produce merger, three circumstances must concur:—*First*, one estate should be immediately consecutive to or expectant on the other, and not separated by any intervening estate;—*secondly*, the ulterior estate, which absorbs the more immediate estate, should be at least equal to, if not greater, (for this is *vexata quæstio*), than such immediate estate;—*thirdly*, the two estates should be held in the same right; though this position, it will be seen, admits of some qualification. It should be observed also, that a few exceptions to the doctrine of merger exist even in cases in which all the preceding circumstances concur. Definition of merger.

First—That there can be no merger where the two estates are separated by a mesne estate, is illustrated by Alderman *Garraway's* case, cited Hard. 417; (see also 3 Prest. Conv. 118); where a lease for one hundred years being made, the reversion was granted for life, and the lessee Mesne estate prevents merger.

BY TENANT FOR LIFE, IN CONSIDERATION OF A RENT-CHARGE.

&c., of the second part; [*purchaser's trustee*], of &c., of the third part; and [*vendor's trustee*], of &c., of the fourth part.

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for years granted his estate to the reversioner in fee; and it was held, "that the lease for years was not destroyed by meeting with the fee." It will be observed, that here the freehold for life intervened to prevent the term from merging in the inheritance.

An intervening estate of *any* extent is sufficient to prevent merger. Thus, if lands were demised to A. for one thousand years, and the reversion was granted to B. for one year or one week, and then the reversion in fee was granted to A., the interposed estate of B. would, so long as it endured, prevent the term of one thousand years of A. from merging in the fee granted to him.

So, if lessee for years grant all his estate except the last day of the term to the lessor, this is not any surrender, (which is equivalent to saying that the term is not merged); for that day is a reversion, and shall prevent the surrender as effectually as if it had been twenty years. *Bacon* and *Waller*, 2 Roll. Ab. 498, (I), pl. 2.

Expiration of mesne estate lets in merger.

Where the mesne estate has expired, the impediment to merger being removed, the estates become consolidated, as they would originally have done if no estate had been interposed. Thus, where a testator devised lands to A. for twenty-one years, to the intent to perform his will and pay his debts, and he then devised the lands to B. in tail, remainder to A. in tail, *B. having died without issue during the term*, by which event his estate tail had ceased, the term devised to A. merged in the inheritance in tail also devised to him. *Lee* v. *Lee*, Moor, 268, pl. 420.

More immediate estate must not be larger than the ulterior estate.

In illustration of the *second* requisite to merger, namely, that the more immediate estate should not be larger than (even if it may be as large as) the ulterior estate, it may be observed, that, supposing lands to stand limited to A. in tail, with remainder to B. for life, and B. to convey his estate for life in remainder to A., no merger would take place; so that if A. died without issue in the lifetime of B., the representatives of A. would still be entitled to an estate for the life of B. But, on the other hand, if the case were the converse of this—that is, if A. were tenant for life, with remainder to B. in tail, and B. the tenant in tail in remainder purchased and took a conveyance of A.'s life estate in possession, the estate for life of A. would merge and be extinguished in the estate tail of B.; so that, if B. afterwards died without issue, his estate tail, which had absorbed the estate for life, having ceased, his interest in the lands would be at an end, though A., the *cestui que vie*, might be living. Bro. Abrid. tit. *Surrender*, pl. 5; 3 Prest. Conv. 237. See also *Windsmore* and *Hulbord's* case, Godb. 52.

As to the merger

In applying the doctrine in question to estates for life, it must be re-

WHEREAS the said [*vendor*] is seised of the messuages, lands, tenements, and hereditaments hereinafter mentioned, and ex-

Recital of seisin of tenant for life, and of the title of tenant in remainder.

membered that estates of this description admit of gradations or degrees, an estate for one's own life being, in contemplation of law, of a higher nature than an estate for the life of another, without regard to the relative age of the respective lives; and therefore, an estate for life (using this term according to its ordinary application, as descriptive of the former interest exclusively,) will not merge in an estate *pur auter vie*, but an estate *pur auter vie* will merge in an estate for life. Thus, "if a lease is made to one for the term of another man's life, without impeachment of waste, the remainder to him for his own life, he is now punishable for waste, *for the first estate is surrendered.*" See *Windsmore* and *Hulbord's* case, Godb. 52.

of one estate for life in another.

So, if a remainder-man for life (as in the text) purchase and take a conveyance of the estate of the antecedent tenant for life, the estate *pur auter vie* thus acquired will merge in his own life estate; see 2 Roll. Ab. 498, (K), pl. 2; and consequently his estate in the lands would be determined by his death, although the *cestui que vie* might be living. In such a case, the only effect of the acquisition of the precedent estate for life would be to accelerate the estate in remainder, by the removal out of the way of such precedent estate, leaving the measure of the purchaser's original estate for life the same. The importance, therefore, of preserving the purchased estate, by conveying it to a trustee, is obvious. On the other hand, if a tenant for life, whether in possession or remainder, purchases the estate for life immediately expectant on his own, it follows, from the principles which have been laid down, that the original estate for life of the purchaser will not merge in the acquired estate for life in remainder, the latter being, as we have seen, the inferior estate; and therefore, the necessity for this expedient would not exist—the purchaser might take a conveyance to himself.

An estate for years being, in legal consideration, inferior to an estate of freehold, a term, however long, will merge in a freehold even of the lowest denomination: thus, a term of one thousand years would merge in an estate for life, whether it be for the life of the tenant or of another; and, by parity of reason, an estate for life will not merge in a term of *any* number of years.

As to the merger of terms in the freehold.

It seems to be doubtful whether an estate *pur auter vie* will merge in a remainder *pur auter vie;* and also whether a term of years will merge in a remainder for years. See 4 Bac. Ab. 212.

Whether an estate *pur auter vie* will merge in a remainder *pur auter vie*, and a term in a remainder for years.

Both these points depend upon the question, whether an estate will merge in an *equal* estate, or whether the absorbing estate must not be

BY TENANT FOR LIFE, IN CONSIDERATION OF A RENT-CHARGE.

pressed to be hereby granted and released, with their appurtenances, during the term of his life; and the said [*pur-*

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the greater estate. If an estate cannot merge, unless by its union with another estate larger than itself, then no merger can arise in the two instances suggested; for all estates *pur auter vie*, however differing in probable duration, and all terms of years, however varying in length, are respectively estates of equal quantity, the law not recognising any gradations in such estates. In the third resolution in *Bowles's* case, 11 Rep. 81, Lord *Coke* certainly assumes that an estate will not merge in one which is not larger in quantity than itself; see also Co. Litt. 299. b.; and another writer of high authority has stated it as essential to the operation of a surrender, (which is governed by the same principles as are applicable to the law of merger), that the surrenderee should have a higher and greater estate than the surrenderor. Sheph. Touch. 303.

Mr. Preston, however, whose opinion on any point connected with this subject carries great weight, seems to incline to the conclusion, that, in the cases under consideration, merger would be produced. 3 Prest. Convey. 201. But, since the doctrine of merger, as applied at least to the case of several particular estates, is generally productive of inconvenience and injustice, it is probable that the Courts would hesitate long before they extended it to any instance in which the absence or conflict of authority left them in some degree at liberty to follow the bias of their own wishes on the subject.

But a term will merge in a reversionary term.

But whatever doubts may exist as to the liability of one term to merge in another term *in remainder*, it is clear that a term will merge in the immediate *reversion* for years; and it is immaterial, in regard to this point, whether the reversionary term be longer or shorter than the immediate term. The reversionary term, of course, can be shorter only when it is created subsequently to the immediate term, being carved out of the original reversion, which remained in the lessor on the granting of that term.

In the case of *Hughes* v. *Robotham*, Cro. El. 302, where the plaintiff was possessed of a lease for years, and the defendant's testator was possessed of the reversion for years, and the testator, in consideration that the plaintiff would surrender to him all his estate, promised to give him 30*l.*, a surrender was alleged, and it was found for the plaintiff; the defendant moved in arrest of judgment, that a termor could not surrender to a termor, for one estate could not drown in the other. As to this *Popham* said, it was clear that he which hath an estate for ten years may surrender to him that hath an estate for twelve years; and the estate is drowned, and the other shall come in possession; and there is no doubt but a surrender to him that hath a greater estate for years is good as to

chaser] is entitled to the said messuages, lands, tenements, and hereditaments, during his life, in remainder expectant

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him that hath an estate for life; which *Gawdy* did expressly affirm; and here it standeth indifferent, if the reversioner had a greater estate for years or not: but if one be lessee for twenty years, and he let the land for ten years, and he surrenders to him that hath the residue of the term, this is good to convey his interest, but not to drown the estate*, but he shall have the twenty years as before; otherwise it is of a surrender to another man that hath the reversion for years. And *Popham* conceived *that if the testator had the reversion for a less number of years, yet the surrender is good*, and the estate shall drown in it. *Fenner*, J., expressed an opinion to the same effect.

Observations upon the doctrine of *Hughes* v. *Robotham*.

This learning is important, on account of its applicability, in practice, to terms of years attending the inheritance. It frequently happens, that several terms, created at different times and of different periods of duration, become, by accident or inadvertence, vested in the same trustee; in which case, under the rules just stated, all the elder terms are merged in the youngest or most recently created term, whether it be longer or shorter than the others; and the consequence is, that incumbrances which have their origin or rise in the interval, (being posterior to the creation of the first, but prior to the creation of the last term), are let in. Thus, if A., the owner in fee, in 1810 demised the lands to B. for one thousand years for securing 1000*l.* and interest, and in 1820 demised the same lands to C. for five hundred years, to secure 2000*l.* and interest, and in 1830 sold the inheritance to D., who paid off the several mortgages, and caused the two terms to be assigned to the same trustee in trust to attend the inheritance; in such case the elder term of one thousand years would have merged in the younger term for five hundred years, and consequently, if, in the interval between the years 1810 and 1820, any judgments had been entered up against A., or he had married, the term of five hundred years, which had become the only subsisting term, would afford no protection against such judgments or the dower of A.'s wife†, as the earlier term, if it had been kept on foot, would have done.

* All that seems to be meant here is, that the twenty years' term retains its full measure or duration.

Dower may be excluded by an assignment of term after the death of the husband.

† In this place it may be as well to notice that the opinion expressed by a writer of great experience and acuteness, in a work often referred to in the above note, 3 Prest. Convey. 536, that a term of years does not exclude the dower unless the assignment be taken in the lifetime of the husband, is contradicted by the recent case of *Mole* v. *Smith*, Jac. 490, where A., being seised in fee, subject to certain satisfied mortgage terms

—Of contract by tenant in remainder for purchase of the estate in possession.

upon the decease of the said [*vendor*]; and the said [*vendor*] hath contracted with the said [*purchaser*] for the sale to him

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In such a case, therefore, the several terms ought to be assigned to different trustees; indeed the one thousand years' term might be vested in the owner of the fee himself, as the reversionary five hundred years' term would prevent its merging in the fee; but the latter plan is in general objectionable, on account of the possibility of the mesne term having been merged or surrendered, in which case the earlier term would be extinguished in the inheritance, and the advantages arising from its being kept on foot would be lost. And this danger is the more imminent, since the doctrine of presuming surrenders of terms assigned to attend the inheritance has sprung up; (*vide ante*, Vol. 6, p. 468); by the operation of which, such a term may have become surrendered without the act, and even contrary to the intention of the owners of the inheritance. The application of this doctrine may often depend upon the learning of merger. Thus, the question, whether a term is capable of being surrendered to the owner of the inheritance, may depend upon the fact that an intervening term is or is not merged. Besides, there is an obvious and intimate analogy between merger and surrender: for it is generally true that a deed will not operate as a surrender, unless the estate of the surrenderor stand in such relation to the estate of the surrenderee, as to

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which were vested in a trustee for him, conveyed the premises by way of mortgage, and afterwards became bankrupt; his assignees sold the property to the defendant and paid off the mortgage. Before the contract was completed A. died, and the purchaser objected to complete the contract on account of the dower of A.'s widow, to whom he was married at the time of the execution of the mortgage; and the case had this circumstance of peculiarity, that the terms had become vested in the widow herself as the administratrix of the deceased trustee; and the only point which underwent much discussion was, whether this circumstance took the case out of the general principle, for no attempt seems to have been made to support the doctrine, that the term, not having been actually assigned to the purchaser's trustee during the life of the husband, could not now be used as a protection against the dower. Lord *Eldon* was of opinion that the sale by the assignees was to be regarded in the same light as if it had been a sale by the bankrupt himself; and that the circumstance of the widow having become possessed, in the representative character, of the terms, was immaterial; she was bound to assign them for the benefit of the purchaser, and the assignment was equally operative to exclude her dower, as if it had been made by a third person. See also 5 Ves. Jun. 545.

of the said messuages, lands, tenements, and hereditaments, during the remainder of the life of the said [*vendor*], in con- BY TENANT FOR LIFE, IN CONSIDERATION OF A RENT-CHARGE.

be capable of merging in it, when they both become by any means united in the same person. If, therefore, the term be so situated that, being assigned to or by any means vested in the owner of the inheritance, it would not merge in that inheritance, the term not being susceptible of surrender to him, it should seem that the presumption-doctrine would not apply. Thus, suppose A., the owner in fee, in 1750 to demise lands to B. for a mortgage term of one thousand years, and in 1760 to demise the same property to C. for a like term, and, both mortgages being paid off, the several terms to have been assigned to different trustees in trust to attend the inheritance. Suppose also various dealings with the property to take place, in which the term of 1760 was regularly assigned, but the term of 1750 was neglected to be noticed, so that, according to the rule in *Doe* v. *Hilder*, (stated *ante*, Vol. 6, p. 470), the term, if there was no mesne term, would be presumed to be surrendered;—would not such a term be altogether out of the scope of the doctrine in question, since that doctrine presumes a surrender to the owner of the inheritance, and in this instance the term is not capable of being so surrendered; for, if assigned to the owner of the inheritance, the deed would not have operated as a surrender, but the term would have remained in him as assignee, distinct from the inheritance? It is true, that the term might have been surrendered to the trustee of the reversionary attendant term; but it would be carrying the doctrine of presumed surrenders a step farther than it has yet been carried, to say that such a surrender is to be presumed. It would be contrary to the duty of the one trustee to make, and the other to accept such a surrender, unless by the direction of the beneficial owner; and if, therefore, the surrender be presumed, such direction must be included in the presumption.

An *interesse termini* will not merge in an estate.

It is clear that an estate will not merge in an *interesse termini*, and it has lately been decided that an *interesse termini* will not merge in an estate. Thus, where, by indenture of lease, dated 17th December, 1799, A. the owner in fee demised the premises in question to B., (who had then an existing lease), from Michaelmas-day which would be in the year 1809 (when the existing lease would expire), for the term of sixty years thence next ensuing. A., before the commencement of the term of sixty years, devised the lands to B. for life; and the question was, whether the *interesse termini* merged in this estate for life, which ceased by the death of the devisee before the commencement of the sixty years? and it was held that it did not. Mr. Justice *Bayley* observed, that, "to constitute merger, there must be an union of two estates; here there was no such union. The *interesse termini* does not acquire the character of an

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sideration of an annuity, or clear yearly rent-charge of £——, to be paid by the said [*purchaser*], his heirs, executors, or

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estate, until the legal interest in the life estate passed away. Instead of two estates having been in B. at the same time, he had never in him more than one estate. He had nothing but the life estate till Michaelmas, 1809, and nothing but the term after that period. Then where is the inconsistency or incompatibility which is essential to constitute a merger? Where a man, but for the doctrine of merger, would be reversioner to himself, would be tenant for years with an immediate reversion in himself for years, for life, or in fee, there is an inconsistency and incompatibility in his filling both characters. He, in the character of reversioner, would be the person to call upon himself, if his reversion were in fee or for life, for waste; it would be to himself he would have to perform the services due from him as tenant; and as reversioner, even for years, he would be able to interpose his second term to protect himself from acts of forfeiture committed by him as tenant under the first: and to prevent these and similar objections the doctrine of merger is founded. But where is the inconsistency or the incompatibility of a man having, not two concurrent, but two successive estates? The objections apply only where they are concurrent; they do not apply where one follows the other. If tenant for years acquire a life interest in the estate *pur auter vie*, the two being concurrent, one only can exist, and the other is merged. But why may not a lease be granted to tenant *pur auter vie*, *&c.*, to commence when his life estate ceases? He will then be tenant of the freehold, so long as *cestui que vie* lives, but amenable to the reversioner for every duty to which that tenancy is subject; and he will be tenant for the term when *cestui que vie* dies, and still amenable to the reversioner for all the duties of that tenancy. He will never stand in the character, which the law of merger is calculated to prevent, of reversioner to himself." *Doe* d. *Rawlings* v. *Walker*, 5 Barn. & Cress. 111; 7 Dowl. & Ryl. 487, *S. C.*

In this case it was ascertained, by an examination of the record, that the case of *Colbourne* and *Mixton*, 1 Leon. 129, which was supposed to establish the doctrine, that an *interesse termini* would merge in an estate, (see 3 Prest. Conv. 124), was incorrectly reported, and that it was not an *interesse termini*, but a reversionary term, which was the subject of merger in this case. See 5 B. & C. 124, 7 Dowl. & Ryl. 505.

Case of *Salmon* v. *Swann*.

But this is not the only case in which the doctrine, that an *interesse termini* may be extinguished in the inheritance, has been advanced. The same doctrine was also broadly laid down in the case of *Salmon* v. *Swann*, Cro. Jac. 619, the circumstances of which, however, are peculiar. They are shortly as follows:—Brook, the owner in fee, subject to an *interesse*

administrators, to the said [*vendor*] and his assigns, during his life, and to be secured as hereinafter mentioned. NOW

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termini to commence on Lord Cobham's death, made a lease of twenty-one years, and then took an assignment of the *interesse termini*. He afterwards granted a rent-charge of 20*l*. *per annum;* and the question was, whether a distress for arrears of that rent, accrued after Lord Cobham's death, should prevail against the lease for twenty-one years. If the term for one hundred years were to be considered as in *esse*, it would, because that term would supersede and be paramount to the term for twenty-one years; but if that were not to be considered as subsisting, it would be otherwise, because then the term for twenty-one years would be paramount to and prevail against the rent-charge. It was resolved, that the term was drowned in the inheritance; for, notwithstanding the lease for twenty-one years, the *interesse termini* was not so severed from the inheritance, but that by grant thereof to him who had the inheritance, the future term was drowned and should never rise again.

Mr. Justice *Bayley*, (5 B. & C. 122, 7 D. & R. 504), has stated the principle of this case to be, that the *interesse termini* "could not be taken to have been obtained by Brook;" "that he might raise the term upon Lord Cobham's death, and so defeat his own lease for twenty-one years; but that it must be taken to have been obtained by him to protect his own lease; that he must be supposed to have acquired it for honest purposes, to extinguish it; not for dishonest purposes, to have the one hundred years' term enjoyed." Upon these grounds the learned Judge was of opinion that this decision did not interfere with the general principle upon which he and the rest of the Court decided the case of *Doe* v. *Walker*.

Interesse termini will not prevent merger.

As an *interesse termini* will not merge in an estate, so, where interposed between two estates, it will not prevent the merger of the prior estate. Thus, in an anonymous case in Dyer, 112 a, where A. leased to B. for ten years, to begin presently, and afterwards A. granted a second lease to C. for ten years, to commence at Michaelmas then next, and then B. purchased the fee, *his term was merged, and C. might enter at Michaelmas* and enjoy his term, by the opinion of the Court of King's Bench, except *Brown*. See also *Symonds* v. *Cudmore*, 4 Mod. 1.

But though an *interesse termini* cannot be the subject of a surrender, it may be assigned or released. See *Hennings* v. *Brabason*, 1 Lev. 45. In this case the question was, whether, under a lease to A., *habendum* to him for eighty-one years from Michaelmas then next, if A. should so long live, and from and after the day of the death of A. for thirty-one years, the latter term was a mere accession to the first term, the whole being one continuing estate, or whether it was a distinct future term? Chief Justice

Testatum.

In consideration of rent-charge, and nominal pecuniary consideration.

THIS INDENTURE WITNESSETH, that, in pursuance of the said recited contract, and in consideration of the

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Bridgeman argued at some length in favour of the former hypothesis; but the other Judges were of a contrary opinion, and judgment was given accordingly.

The principle applicable to such cases seems to be involved in some obscurity.

Illustration of the distinctions suggested by the preceding cases.

It is essential to the correct knowledge and proper application of the several rules before noticed, that the reader should form accurate notions of the distinctions between terms which confer a present reversionary interest, and terms which confer a future interest by way of remainder, and of the distinction between both these several interests and an *interesse termini*. A few observations, therefore, upon these points may be useful.

Where a term of years is granted to A., and, pending this lease, another term of years is granted to B., commencing *instanter* (as every lease does which is not expressly made to commence at a future period), the second lease operates as an immediate grant of the reversion, which remained in the lessor, and carries with it the right to the seignorial dues and services under the first lease. If, therefore, a rent were reserved to the lessor by the first lease, it would belong to the lessee of the second lease, so long as that lease, if for a shorter term than the other, endured. If, however, two terms are limited by the same deed, the one expectant on the other, as if lands were conveyed by lease and release to the use of A. for ninety-nine years, if he should so long live, and after the determination of that estate to the use of B. for ninety-nine years, if he should so long live, with remainders over; the second term stands to the first in the relation or character of a remainder, and the owner of that estate is entitled to none of the seignorial services due from the first termor. In the first of the cases suggested, it will be observed, the terms are concurrent; in the last, they are successive. An *interesse termini* is distinguishable from both these interests. In describing it, I need only observe, that, to the perfection of every common-law lease (so called to distinguish it from an instrument which derives its effect from the statute of uses), entry is requisite, and before entry the lessee has only an *interesse termini*. Some writers have referred to an *interesse termini* as if it was an essential ingredient in it, that the time of the commencement of the lease should be future; but this is not necessarily the case, for if a lease were granted for seven years hence ensuing, the lessee would have but an *interesse termini* until entry, though it confer an immediate right of entry. Before entry the intended lessee has no *estate*. It most commonly happens, however, that this species of property is created

annuity, or clear yearly sum of £——, of lawful money of Great Britain and Ireland, secured to be paid to the said

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where a future lease is granted pending an existing lease, and which is to take effect immediately on its determination. Such future leases are very common in some parts of the country.

As to the merger of one estate in another, limited by the same conveyance.

Merger is not merely consequent on the accession of one estate to another by events posterior to their creation, but may be produced by the effect of several consecutive limitations to the same person, contained in the same deed of conveyance; as in the case of a limitation to A. for ten years, with remainder to him for life; or, to A. for the life of B., with remainder to him for his own life: in the former of which cases the term, and in the latter the estate *pur auter vie*, would merge in the estate for life of A. See *Windsmore* and *Hulbord's* case, Godb. 52.

Effect where a remainder is limited to one of several joint tenants for life.

But estates will sometimes preserve their separate and distinct characters, when vested in the same individual, by several limitations in one conveyance, which would become consolidated if the union were effected by subsequent events—an exception to the doctrine of merger, which has grown out of an anxiety to avoid a construction that would instantly subvert the intention of the author of the limitations. Thus, if lands are limited to A., B., and C., for life, with remainder to the heirs of one of them, or (which is the same in effect) with remainder in fee to A.; the joint estate for life is not severed as to A., but A., B., and C. continue joint tenants for life, with remainder in fee to A. While, on the other hand, if the limitation had been to A., B., and C., with remainder in fee to D., and D. had *subsequently* conveyed the remainder in fee to A., the estate for life of A. would merge in the remainder in fee, *i. e.* he would be owner in fee in possession of one undivided third (being tenant in common with B. and C., in respect of the life estate, which was severed), and owner in fee in remainder of the other two-thirds. *Wiscott's* case, 2 Rep. 60. So, upon the same principle, if a reversion in fee be granted to the tenant for life and a stranger, the merger will take place *quoad* one moiety. *Anon.* Godb. 2. Again, if "tenant for life grants his estate to him in reversion and a stranger, it is a surrender for one moiety, for it appears here, that by getting of the reversion and the particular estate at several times, the reversion expectant upon his particular estate for life cannot remain distinct in him and grantable over, but the one shall merge the other, and the benefit of survivorship shall not be regarded." *Wiscott's* case, 2 Rep. 60. A doctrine the reverse of this is laid down, Perk. s. 618, where it is said, that if lessee for life of land grant his estate to him in reversion, and to two other men, it is not a surrender for any part. But this seems not to be law. Also, it is to be observed, that the case of an estate created by will, and

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[*vendor*] and his assigns during the term of his natural life, as hereinafter mentioned, and of the sum of 10*s*. of like law-

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an estate simultaneously descending from the testator, comes within the principle of the doctrine under consideration. Thus, if a man has three sons, A., B., and C., and he devises lands to them jointly for life, leaving the reversion in fee to descend to A., his eldest son, the descent of this reversion will not sever the tenancy: and therefore, upon the death of A., B., or C., the estate would devolve, under the right of survivorship, which is incident to a joint-tenancy, to the survivors. On the other hand, if the reversion had *subsequently* descended to one of the joint-tenants, *i. e.* if, in the case before supposed, A., after the death of his father, had died without issue and intestate, the descent of the reversion to B., the next brother, would sever the joint-tenancy, and B. and C. would thenceforth be tenants in common, *i. e.* B. would be owner in fee in possession of one moiety, and the other would belong to B. for life, with the reversion in fee to C.

As to merger, where its effect would be to destroy a contingent remainder.

So, it is well settled, that where a contingent remainder is interposed between several successive estates, which are limited to the same person by the same conveyance, the two estates will not become consolidated so as to exclude the mesne remainder, but will open and let in the remainder when the event upon which it is limited to arise shall happen. And here also, a reversion descending at the instant of a testator's death to the devisee for life, will not merge the estate for life so as to destroy a contingent remainder depending on that estate. Thus, in the case of *Plunket* v. *Holmes*, 1 Lev. 11, where a man seised in fee devised lands to his eldest son Thomas for his life, and, if he died without issue living at his death, to Leonard, another son, and his heirs; but if Thomas had issue living at his death, then the fee should remain to the right heirs of Thomas: it was held that the reversion in fee which descended to Thomas did not merge the estate for life, contrary to the express devise and intent of the will, but left an opening for the interposition of the remainders, when they arose, between the estate for life and the fee. See also *Boothby* v. *Vernon*, 9 Mod. 147.

It is clear, however, that if the fee, instead of descending to Thomas at the instant of the death of the testator, who created the particular estate and the contingent remainder in fee, had been acquired by Thomas, by descent or otherwise, at any *subsequent* period, the contingent remainder would have been destroyed.

And this destruction would be effected as well by the surrender of the particular estate to the reversioner or remainder-man, as by the accession of the reversion or remainder to the tenant for life, by descent or other-

ful money to the said [*vendor*] by the said [*purchaser's trustee*] in hand paid at or before the sealing and delivery

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wise; *Thompson* v. *Leach*, 2 Vent. 206; *S. C.* 3 Lev. 284; and a similar result is produced, when the owner or owners of the several estates between which the contingent remainder is interposed, conveys or join in conveying them, either for their own use or for the benefit of a third person, though such conveyance be made by lease and release, or any other species of conveyance, usually denominated innocent, as distinguishing them from tortious conveyances.

Thus, if lands stood limited to A. for life, with remainder to his first and other sons in tail male, with remainder to A. in fee, and A., before the contingent remainder took effect, *i. e.* before the birth of a son, conveyed the fee-simple to B., by lease and release, bargain and sale enrolled, or any other mode of assurance, the contingent remainder would be destroyed, and it would not be requisite for this purpose that the conveyance should have been for a valuable consideration, or that the deed should express an intention to destroy the remainder. That destruction is effected simply by the consolidation of the two estates.

The doctrine of merger as affecting estates held in different rights.

We come now to the consideration of the *third* requisite to merger, mentioned at the commencement of the present note, namely, *that the several estates should be held in the same right.*

As between husband and wife.

It is, generally speaking, true that an estate will not merge in another estate held in a different right. Thus, in the case of *Platt* v. *Sleap*, Cro. Jac. 275, it was resolved, that where the husband had a term for years in his own right, and the inheritance afterwards descended to his wife, "that coming to him in another right" should not drown and extinguish the term*. So, in *Bracebridge* v. *Cook*, Plowden, 417, where the husband made a lease for years, the lessee granted the term to the wife of the lessor and a stranger, who survived the wife. It was adjudged that he should have the entirety of the lands for the residue of the term by survivorship. One of the points made in this case was, whether or no the immediate freehold and inheritance which the husband had, should merge the term which the wife had in the moiety, and so dissolve the jointure

* Whether, where the husband is possessed of a term in right of his wife, the term is merged by the descent of the fee on her during the coverture, is an undecided point. See 3 Prest. Conv. 304. The better conclusion is in favour of the preservation of the term for the benefit of the husband. If the coverture determined by the husband's death, without his having exercised his power of disposition over the term by act *inter vivos*, at that instant the merger would take place.

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hereof, the receipt whereof is hereby acknowledged, he the said [*vendor*], upon the nomination of the said [*purchaser*],

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between the wife and the stranger? And as to this point it was said, the case was no other than this:—if the lessor who had the fee-simple married with a woman, his lessee for years; or if the husband made a lease for years, and the lessee granted his estate to the wife of the lessor—whether this should extinguish the lease for years or not; for, if it should, the moiety of the lease in that case was extinguished and merged by the immediate inheritance which the husband had in the land. And the Court held the law to be, that the immediate estate of inheritance, which the husband in that case had, should not merge or extinguish the moiety of the term which the wife had; because he had the inheritance in his own right, and the term in right of his wife; in which case the freehold and inheritance of the husband, wherein the wife had nothing, should not merge the term of the wife. For, as it was observed, the law, which carried in itself reason and equity, would not do prejudice to another; and in that case the wife was other than the person who had the inheritance; and the marriage of husband and wife was a laudable thing, for which reason the law would not prejudice the wife in her chattels real: nevertheless, that the husband might have given away the wife's term by an express act, as if he had made a feoffment of the land, or a new lease, or the like; but forasmuch as he had not done this or any thing else with the land, and had made no disposition at all of it, but had left it to the judgment of the law, the law would preserve the estate of the wife, which estate, as to her, was disjoined from the freehold and the fee-simple.

It should be observed, however, that the exemption from merger, where the several estates are held in different rights, is not universal, but admits of some material qualifications. Lord *Coke* states the distinction to be, that a man cannot have a term for years in his own right, and a freehold *en auter droit*, to consist together, but that he may have a freehold in his own right, and a term *en auter droit;* and therefore, if a man lessee for years takes a *feme* lessor to wife, the term is merged; but that if a man lessor takes the *feme* lessee to wife, the term is not drowned, but he is possessed of the term in her right during the coverture. Co. Litt. 338. b. This distinction, however, for which no reason is assigned, is shewn by Mr. Preston to be inconsistent with the authorities, from which, in the opinion of that learned text writer, the following conclusion is to be drawn: namely, that when the accession of one estate to the other, (the two being held in different rights), arises *by act of law*, as, by marriage, by descent, by executorship, intestacy, (*i. e.* by descent), &c., no merger takes place; but *contra* where it arises *by the act of the party.* 3 Prest. Conv. 285.

(testified by his executing these presents), *Hath* granted, bargained, sold, released, and confirmed, and by these pre- Vendor grants.

When a term vested in an executor merges in the fee acquired by him *proprio jure*.

Thus, though it is quite clear, that where a leaseholder nominates as his executor the person who has the reversion in fee expectant on the term, the term which devolves to the executor in his representative character, does not merge in the fee, which he has in his own right. Co. Litt. 338. b. Yet, on the other hand, it seems that if the executor, who has a lease for years from the testator, *purchases* the freehold, the term is extinguished; Brooke, tit. *Extinguishment, Surrender*, pl. 52; 1 Roll. Ab. 934, pl. 9. See also 4 Leon. 37; 3 Prest. Conv. 277; (*Quære*, if the same principle applies in the case of a purchase by an *administrator?* see Godbolt, 2); and the contrary *dictum* of Lord Chief Justice *Holt*, in *Gage* v. *Acton*, 1 Salk. 326, has been considered to be overruled by the current of authorities. So, where a married woman had a term as executrix, and the husband purchased the inheritance, it was held that the term was merged, so as to be extinct as to the wife if she survived, though, in respect of all strangers, it should be accounted assets in her hands. *Anon.* Moor, 54, pl. 157; see *Lee's* case, 3 Leon. 112.

This doctrine obviously suggests that an executor, who buys the reversion of lands of which his testator was lessee, should have the estate conveyed to a trustee for him, as the taking the conveyance to himself, by which the term is extinguished, is a *devastavit*, unless indeed there are no debts, and the executor is himself the legatee of the term, in which case, he being for all purposes the beneficial owner, may of course extinguish the term or otherwise deal with it for his own benefit. Where the reversion has accrued by act of law to an executor who is also legatee, the merger would depend upon the fact, whether he held the property in the character of executor or legatee. In the latter case the term would, and in the former it would not be merged. It is not very clear what is meant in these cases by the executor "purchasing" the fee, whether it refers, according to the popular signification of the word, to a buying for a pecuniary consideration, or whether it means, according to its more technical import, the acquisition of the fee otherwise than by descent, which of course would extend to a *devise*. Looking at the probable reason of the rule, the latter seems to be the better construction; for it must be intended, that, wherever the executor obtains the fee by any means, to the efficacy of which his *assent* is necessary, as distinguished from a descent, which is simply the act of law, and operates independently of the volition of the party on whom the law casts the property, merger will take place.

Again, by way of further illustration of the distinction in question, though it is clear, as we have seen, that if a woman possessed of a term

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sents *doth* &c., unto the said [*purchaser's trustee*] and his heirs, (in the actual possession, &c.): ALL *(parcels)*, together

Parcels.

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marries a man who has the fee, the wife's term is not merged; see *Bracebridge* v. *Cook*, Plow. 417; 1 Roll. Ab. 934, pl. 11; yet it should seem, that if the husband after the marriage *purchases* the reversion in fee, the term is extinguished; 4 Leon. 37; see also *Downing* v. *Seymour*, Cro. El. 912; where, however, the term, which was held to be merged by the feoffment to the husband, was granted to the husband *and wife*. But see Hob. 3.

It will be observed, that, in the first of the two cases just stated, the executor, and in the second the husband, had the power of alienation over the term in the representative or in the marital character, and his purchase of the reversion was considered as equivalent to such an alienation. In coincidence with this reasoning it should seem that there is no merger in regard to several estates held in different rights, where its effect would be to extinguish an estate which a party had power to dispose of, in one over which he had no power of disposition, though the accession of the second estate to the first was the consequence of his own act. Thus, in the case of *Lichden* v. *Winsmore*, 1 Roll. Ab. 934, pl. 10*, it was decided, that if there be lessee for years with reversion for life to a *feme covert*, and the lessee grants his estate to the husband, and then the wife dies, the term is not extinct, inasmuch as the husband has the estates in several rights, the freehold in right of his wife, and the term in his own right.

Remarks upon the case of *Lichden* v. *Winsmore*.

The effect of applying the doctrine of merger in this case would have been to extinguish the term, of which the husband was absolute owner, in the freehold, over which he had no disposing power; and therefore it seems not unreasonable to refer this case to the distinction which has been stated, though it was not the professed ground of the decision; for in no other manner can it be reconciled with the authorities before cited in support of the position, that a purchase by the husband of the inheritance will merge a term of which he is possessed in right of his wife.

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* This case is a decisive authority against Sir *Edward Coke's* position, that a man cannot at the same time be owner of a term of years in his own right, and of the inheritance in another right; and the cases already cited, of a purchase of the fee by the husband of the lessee, are equally conclusive against his position as to there being no merger, where the term is *in auter droit*, and the freehold in his own right. Both classes of cases shew that *any* position, if stated without qualification, is untenable. The learned Commentator's distinction was also denied by Lord *Nottingham* in *Thorn* v. *Newman*, 3 Swanst. 603.

with all and singular edifices, &c.; And all the estate, &c.; To HAVE AND TO HOLD all and singular the messuages, lands, te- BY TENANT FOR LIFE, IN CONSIDERATION OF A RENT-CHARGE.

Habendum.

On the same principle, it is clear that the freehold of which the husband is seised in his own right, will not merge in the inheritance of which he is seised in right of his wife. Perk. s. 622; 3 Prest. Conv. 305. But it was assumed, in the case of *Stephens* v. *Britridge*, 1 Lev. 37, that the freehold of the husband would merge in a joint remainder in tail limited to the husband and wife. The case, however, did not raise the point, as there was a mesne remainder in the wife.

The principle establishing the exception to the doctrine of merger, which has been deduced from the case of *Lichden* v. *Winsmore*, itself has its exception, if Mr. Preston is right in his position, 3 Conv. 473, that the entirety of lands held by a husband for a term of years in right of his wife *will* merge in a freehold limited to him and his wife. 2 Roll. Ab. 495. The reason assigned is, that "the husband has the entirety of the term, as well as of the freehold;" but it will be obvious to the learned reader, that the position involves a direct infringement of the principle in question; for the husband has no power of alienation over lands vested in himself and his wife as tenants by entireties, which is the nature of the freehold in which the husband's term is here described to be extinguished. The Editor has not succeeded in finding the authority to which Mr. Preston refers.

As the husband has no power of disposing of a freehold of which he is seised in right of his wife, it is clear that an estate of this description will not merge in his (the husband's) inheritance, whether that inheritance be acquired by his own act or by act of law*. As to the merger of the wife's freehold.

And an estate of freehold of the wife will not merge in a joint remainder in tail, limited by the same conveyance to the husband and wife†.

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* The case of *Stephens* v. *Britridge*, 1 Lev. 37, however, stated *post*, p. 18, which is cited by Mr. Preston, 3 Treat. Conv. 306, as exemplifying this position, does not completely illustrate it, because the inheritance was not acquired by the act of the husband subsequently to the marriage, but was limited to him before the marriage by the same deed of conveyance as created the freehold of the wife. Under such circumstances the estate of the wife, even if it had been a *term*, would not have merged.

† It is scarcely necessary to remind the reader, that if an estate tail is limited to persons who *afterwards* become husband and wife, they are joint-tenants, but where the limitation is to them *during* the coverture, they are tenants by entireties. As to estates by entireties.

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nements, hereditaments, and other the premises hereinbefore mentioned and expressed to be hereby granted and released,

Thus, in the case of *Stephens* v. *Britridge*, 1 Lev. 37*, where by antenuptial settlement lands were conveyed to the intended husband for his life, remainder to the intended wife for her life, remainder to the heirs of their bodies, it was held that the estate of the wife was a mesne remainder between the estate for life of the husband and the estate tail; and that it could not be intended, that, when an estate for life was limited to the wife, this should instantly merge in the remainder in tail to the heirs of the husband and wife.

But an estate of freehold of the wife will merge in the inheritance, which is purchased by and conveyed to the *husband and wife* as tenants by entireties; subject however, it seems, to the right of the wife, if she survive, to restore herself to the freehold by waving the inheritance. See 3 Prest. Conv. 472.

Thus, in *Purefoy* v. *Rodgers*, 2 Lev. 39, *S. C.* 4 Mod. 284, where a woman was tenant for life with remainder to her first son in tail, and before the birth of a son the reversioner conveyed the inheritance to the wife and her husband; it was held that though the wife, if she survived the husband, might have avoided the estate taken by the fine, yet the contingent remainder was destroyed; for the husband and wife took by entireties, *and the estate for life was merged* before the contingency happened.

Remarks upon *Purefoy* v. *Rodgers*.

It will be observed, in reference to the last case, that, as the husband alone is incapable of disposing of the inheritance whereof he and his wife are tenants by entireties, the wife cannot be prejudiced by the merger of her freehold in that estate; but this observation applies exclusively to an estate for the wife's own life, and not to an estate *pur auter vie*, limited to her and her heirs; for, in regard to the latter, if the wife died, living the *cestui que vie*, and living also the husband, the inheritance would survive to the husband, while the freehold, if it had not become extinct, would have devolved to her heirs. The merger, therefore, would operate to her prejudice. If the freehold were for her *own* life, this event, the only one in which the wife could be prejudiced, could not happen; for if she died in the lifetime of the husband, the estate would be gone, and if she survived him, she might elect to have her freehold and wave the inheritance.

General remarks.

It were to be wished, that, instead of adopting all the distinctions which have been the subject of consideration in the present section, the Courts

* Mr. Preston has erroneously treated the remainder in tail in this case as being limited to the husband alone, instead of to the husband and wife. 3 Conv. 118.

with their and every of their rights, members, and appurtenances, unto the said [*purchaser's trustee*] and his heirs, during

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had uniformly adhered to the principle negativing the applicability of the doctrine of merger to the case of several estates held in different rights; and to this hypothesis the editor's first examination of the subject led him to incline; for the two principal if not only exceptions to it, namely, the purchase of the inheritance by the executor and by the husband of the termor, have been disapproved of by very high authorities; the former by Lord Chief Justice *Holt*, in the case of *Gage* v. *Acton*, 1 Salk. 326; and the latter by Lord Chief Justice *Hobart*, in the case of *Young* v. *Radford*, Hob. 3; to which must be added the case of *Lichden* v. *Winsmore*, unless that case can be referred to the distinction before mentioned, which was not recognised in the decision itself. But, since the hypothesis in question would not have reconciled *all* the authorities, and both Mr. Preston and Sir E. B. Sugden, Vend. & Purch. 396, have treated it as a point well settled, that a purchase of the reversion expectant on a term by the husband or executor of the termor does merge the term; it seemed advisable rather to follow in the track of these eminent writers, than broach any new theory, in favour of which the authorities did not very decidedly preponderate; for it is generally more conducive to the interests of society, that the law upon any point should be settled in some manner, than that one particular doctrine should prevail over another.

Exceptions to the doctrine of merger.

The present note will be concluded by stating some exceptions to the law of merger, not falling under any of the preceding divisions.

Where a person purchases two successive estates.

When the owners of several estates, by one and the same deed of conveyance, assure those estates to a purchaser, no merger, it seems, will take place, though the estates would have coalesced if they had become vested in either of the grantors by the act of the other, or in the purchaser by two several grants or conveyances. The leading authority for this doctrine is *Bredon's* case, 1 Rep. 77, where A., being tenant for life of land, with remainder in tail to B., with remainder over in tail to C., joined with B. in levying a fine *come ceo*, &c. to another in fee, rendering a rent-charge of 40*l.* B. dying without issue in the lifetime of A., C. entered as for a forfeiture. A. distrained for the rent-charge: and it was held, in an action of replevin, that the fine levied by A. and B. was no discontinuance, but that each of them gave only that which he might lawfully give, *viz.* the tenant for life gave his estate, and he in remainder a fee-simple determinable; and judgment was given in favour of the tenant for life, who had a return of the cattle distrained, after they had been replevied, on the ground that there was not any forfeiture, and that the rent, and of consequence the title or seisin under the tenancy for life, continued after the death of the tenant in tail without issue. And in

Bredon's case.

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the term of the natural life of the said [*vendor*]: *Nevertheless*, to, for, and upon the uses, trusts, intents, and purposes herein-

Uses — *Treport's* case.

Treport's case, 6 Rep. 14, it was said by *Popham*, C. J., "if tenant for life and he in the reversion make a gift in tail, rendering rent, the lessee shall have the rent during his life." "This, of course," observes Mr. Preston, "was an admission that the estate of the tenant for life was a continuing ownership; for unless that estate existed in point of law, distinct from the inheritance, and not confounded in the same, the rent could not have belonged to the tenant for life; and *Popham*, in terms still more express, declared it to be his opinion, that if tenant for life and he in the reversion had made a feoffment by deed at the common law, the feoffee should hold of the lessee during his life; which proves, in a manner the most incontrovertible, that the estate for life was not destroyed; for, supposing it to have been destroyed, the tenure must have been of the reversioner, and not of the tenant for life. From this opinion it must be collected, that if the estate tail had determined in the lifetime of the tenant for life, the right of possession would have been in the alienee under the estate for life, and not in the reversioner, till the estate, formerly of the tenant for life, was determined by his death, or by some other means." 3 Prest. Conv. 416.

The doctrine under consideration was also distinctly recognised by Sir *Henry Hobart*, in the Earl of *Clanrickard's* case, Hob. 273, where a lady was tenant in tail with reversion to her husband for life, and they joined in a fine, and it was contended that this fine was a discontinuance by the tenant in tail, and so the estate for life did drown and extinguish itself in the fee-simple granted to the conusee. The learned Judge answered this argument, by premising, that "the estate for life is not by that fine drowned and extinct; but that the estate in tail and for life are both conveyed lawfully, as estates in being, to these conusees: so, *first*, the estate for life is not forfeited by this fine; *secondly*, it is not involved in the estate given by the tenant in tail; but it is given distinctly, as an estate by itself, in judgment and by the force of law." It will occur to the learned reader, that *Clanrickard's* case does not properly exhibit an illustration of the exception to the general doctrine of merger under consideration, since, according to the general doctrine, an estate for life could not merge in a *prior* estate tail; but the reasoning of the learned Judge quite loses sight of this fact, for it treats the case before him, and *Bredon's* case, as referable to the same principle; and the following passage in his judgment distinctly recognises the principle which has been deduced from that case: "where a tenant for life and he in remainder join in a fine, and the tenant in tail dies without issue, the conusee shall hold the land *during the life of the tenant for life*." This doctrine, therefore, is well fortified by authority, though it would be difficult

after limited, expressed, and declared of and concerning the same, (that is to say), To the use, intent, and purpose that the —that grantor may receive a rent-charge.

to find any very solid reason for it. The doctrine is at least recommended by its result, for it gives a man all that he has contracted to purchase, part of which the law of merger, if it operated in this instance, would, by extinguishing one of his estates, take from him.

This exception, it is conceived, would only apply where the estates conveyed to the purchaser did not exhaust the whole fee-simple; if they did, as no advantage could arise to the purchaser from the estates remaining in him distinct, they would become consolidated. Thus, if lands stand limited to A. for life, with reversion or remainder in fee to B., and A. and B. join in conveying their respective estates to C., C. would become tenant in fee-simple in possession.

As to merger as affecting estates subject to a trust.

As merger is a conclusion *of law*, flowing from the union or coalition of several *legal* estates in the same person, it is the *legal* quality of the estates which alone is to be regarded; and its operation will not be excluded by the fact, that one of these estates is held beneficially, and the other as trustee, since this is a circumstance cognizable only in a Court of equity. See *Lee* v. *Lee*, Moore, 268, pl. 420; *Nurse* v. *Yerworth*, 3 Swanst. 608. If, therefore, lands were conveyed to A. for the life of, and in trust for, B., and the reversion in fee-simple afterwards descended to A., the estate of A., which was clothed with the trust, would merge in the inheritance, of which he was both legal and beneficial owner, but the equitable rights of the *cestui que trust* would of course be unaffected by the extinguishment of the estate for life on which the trust was engrafted, and he would have the same claim upon A. in respect of the rents accruing during his (B.'s) life as before. And where an estate subject to a trust has been improperly merged, equity will sometimes, at the instance of the *cestui que trust*, direct the party in whose estate it has become extinguished, to execute an assurance, reviving the merged estate, or, to speak more correctly, creating a similar estate. Thus, where A., being possessed of the residue of a term of one thousand years in lands, the reversion in fee of which was in B., assigned the residue of the term to B. and C. upon certain trusts; the heir-at-law of B. having claimed one moiety of the lands beneficially, on the ground of the term being merged in respect of such moiety, the Court of Chancery, on a bill filed by the persons beneficially entitled to the term, decreed the heir-at-law to make a new grant of the undivided moiety, the term in which was merged, for a period corresponding with the residue of the old term. *Saunders* v. *Bournford*, Finch, 424.

There is no merger, for most purposes at least, where both the interests are equitable. This point was distinctly decided by Lord *Nottingham* in *Thorn* v. *Newman*, 3 Swanst. 603; but the rule does not hold uni-

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said [*vendor*] and his assigns shall and may yearly and every year, during the term of his natural life, have, receive, and

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versally—for instance, as between the real and personal representatives of a deceased owner, an equitable term and inheritance would become consolidated.

Merger where the trustee of an attendant term is appointed one of several devisees in trust of the inheritance.

And here it may be observed, that it sometimes happens in practice, that the person who is a trustee of an attendant term, being a friend of the owner of the inheritance, is appointed one of the devisees in trust of his will, and becomes in that character seised jointly with his co-devisees of the reversionary inheritance. Under such circumstances, the term becomes merged in the inheritance to the extent of the trustee's share. Thus, if there were two trustees of the fee, the term would merge as to one moiety, if there were three trustees, it would merge only as to one third, and so as to any other number. So, in the converse case, *i. e.* where a term is assigned to several persons, one of whom, at the time of the assignment, or afterwards, is seised of the inheritance in fee, subject to the term, merger is produced *quoad* the share of the person who sustains the double character of joint-tenant of the term and sole owner of the fee. See *Saunders* v. *Bournford*, Finch, 424. Of course, if there was a reversionary term outstanding in a third person, the merger would in both these instances be wholly prevented.

Estates tail do not merge.

Another exception to the doctrine of merger exists in the case of estates tail, which it is well known do not merge, for it is in every day's experience that a man may be tenant in tail general or special, with immediate reversion or remainder in fee to himself. See *Wiscot's* case, 2 Rep. 60; also 2 Blackst. Comm. 177. This is a consequence of the equitable construction of the statute *de donis*, which would have been of little avail if the estate tail had not been protected from merger. 3 Prest. Conv. 344. But where a tenant in tail, with immediate reversion or remainder in fee to himself, levies a fine with proclamations, the estate tail is extinct, and the reversion or remainder takes effect in possession, by which all the incumbrances affecting the reversion or remainder are accelerated —a point which it is often important for the practical conveyancer to keep in view. See *Symonds* v. *Cudmore*, Salk. 338; Earl of *Shelburne* v. *Biddulph*, 1 Bro. P. C. 594, stated 3 Prest. Conv. 350; see also Lord *Hardwicke's* judgment, 2 Atk. 206.

As to estate tail, after possibility.

The doctrine which exempts estates tail from merger is founded on a regard to the rights of the issue, and where these are not concerned, as in the instance of an estate tail after possibility of issue extinct, the estate is liable to the operation of merger, such an estate being considered with respect to *quantity*, which is the material point in reference to the doctrine of merger, as an estate for life. *Bowles's* case, 11 Rep. 80.

Estate will not

Again, it is clear that the momentary seisin of a releasee or gran-

take one annual sum or yearly rent-charge of £——, of lawful money of Great Britain and Ireland, to be yearly issuing, going, and payable out of, and charged and chargeable upon all and singular the messuages, lands, tenements, and hereditaments hereinbefore granted and released, or intended so to be, and to be paid to the said [*vendor*] and his assigns at or in the common dining hall of Lincoln's Inn, in the county of Middlesex, on the four most usual days of payment of rent in the year, that is to say, the twenty-fourth day of June, the twenty-ninth day of September, the twenty-fifth day of December, and the twenty-fifth day of March in every year, by equal portions, free from taxes, and without any other deduction whatsoever, (except for or on account of the land-tax (*b*),) the first quarterly payment to begin and be made on

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tee to uses is inoperative to produce merger; and, therefore, where the freehold in lands is conveyed to A. to the use of B., any term of which A. happened to be possessed in those lands would not be affected; *Cheyney's* case, Moore, 196, pl. 345; and where a termor was made tenant to the *præcipe* for suffering a common recovery, the term was held not to be extinguished. *Ferrers* v. *Fermor*, Cro. Jac. 643; see also 1 Vent. 280; Sugd. Vend. 398. But it is settled, that, where the term has become extinguished in an estate of freehold *upon condition*, the term once merged is not revived, though the estate subsequently fails by the breach of the condition. Co. Litt. 218. b. So, where the lessor mortgaged his reversion in fee to the lessee for years, and, on the day appointed by the mortgage deed for the payment of the money, he paid the same, it was holden that the lease for years was not revived, but utterly extinct. 3 Leon. 6, ca. 16. But of course a surrender may be made upon condition, so that, when the condition is broken, the deed fails of effect, and the term remains in the surrenderor. Perk. s. 624; 2 Roll. Ab. 498, (K), pl. 1. And here it may be noticed, that where a term, which is subject to an executory bequest over, becomes merged in the fee, whether by act of law or of the party, the executory interest is not (as in justice it ought not to be) defeated. *Lee* v. *Lee*, Moor, 268, pl. 419; see also *Cotton* v. *Heath*, Pollexf. 26.

merge in seisin of grantee to uses.

As to merger of a term in a freehold granted upon condition.

(*b*) Without this exception, the preceding words would have included exemption from the land-tax. *Bradbury* v. *Wright*, Doug. 624. But it should seem, though the point has escaped notice, that the land-tax does not apply to any fee farm rent or rent-charge created since the statute 38 Geo. 3, c. 5, as that statute, which was an annual act only, but is made perpetual by stat. 38 Geo. 3, c. 60, recites that lands "*stand*"

Whether rents are subject to land-tax.

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the twenty-fourth day of June next ensuing the date hereof; *And to and for this further use, intent, and purpose,* that in case the said annual sum or yearly rent-charge of £——, or any part thereof, shall at any time or times be unpaid by the space of fourteen days next after any of the said days whereon the same ought to be paid as aforesaid, then it shall be lawful for the said [*vendor*] or his assigns during his natural life, into and upon the said messuages, lands, tenements, and hereditaments so charged with the said annual sum or yearly rent-charge of £—— as aforesaid, and into and upon every or any part thereof, to enter and distrain, and the distress and distresses then and there found to take, lead, drive, carry away, and impound, and in pound to detain and keep, until the said annual sum or yearly rent-charge of £——, and all arrears thereof, together with all costs and expenses occasioned by taking and keeping such distress and distresses, shall be fully paid and satisfied; and in default of payment thereof, or of any part thereof respectively, in due time to appraise, sell, and dispose of such distress or distresses, or otherwise to act therein according to the true course of law, in like manner as in cases of distress taken for non-payment of rent reserved upon common leases; *To the intent* that the said [*vendor*] or his assigns shall be fully paid and satisfied the said annual sum or yearly rent-charge of £——, and all arrears thereof, and all costs and expenses attending the non-payment and recovery of the same; *And to and for this further use, intent, and purpose,* that in case the said annual sum or yearly rent-charge of £——, or any part thereof, shall at any time or times be unpaid by the space of twenty-eight days next after any of the said days hereinbefore mentioned and appointed for payment thereof, then it shall be lawful for the said [*vendor*] and his assigns, during the term of his natural life, (although no formal or legal demand shall be made), into and upon all and singular the said hereditaments and premises, or into and upon any

Power to distrain.

Power to enter.

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incumbered with such charges, and then authorizes the proprietors to deduct a proportion of the land-tax in respect thereof. This seems not to extend to rents not then in *esse*. *Vide ante*, Vol. 3, p. 389, 2nd edit. The exception in the text is therefore improper.

part thereof in the name of the whole, to enter, and the same to hold and enjoy, and the rents and profits thereof, and of every part thereof, to receive and take for his and their own use, until he or they shall thereby and therewith, or by any other means, be fully paid and satisfied the said annual sum or rent-charge of £——, and all arrears thereof, and all such arrears of the same as shall grow due or incur during the time that he or they shall by virtue of such entry or entries be in possession of the premises or any part thereof; together with all costs and expenses whatsoever attending the non-payment or recovery of the same or any part thereof, or in relation thereto. AND as to, for, and concerning all and singular the messuages, lands, tenements, and hereditaments hereinbefore mentioned and expressed to be hereby granted and released, with their appurtenances, subject to and charged with the said yearly rent-charge or sum of £——, and to the remedies hereby provided for the recovery thereof, TO THE USE of the said [*vendor's trustee*], his executors, administrators, and assigns, during the full end and term of ninety-nine years henceforth next ensuing and fully to be complete and ended, in case the said [*vendor*] shall so long happen to live, upon the trusts hereinafter declared concerning the same; And after the expiration or sooner determination of the said term of ninety-nine years, and in the meantime subject thereto, TO THE USE of the said [*purchaser's trustee*] and his heirs, during the life of the said [*vendor*], *In trust*, nevertheless, for the said [*purchaser*], his executors, administrators, and assigns; and to, for, or upon no other use, trust, intent, or purpose whatsoever. *And as to, for, and concerning* the said term of ninety-nine years hereinbefore limited to the use of the said [*vendor's trustee*], his executors, administrators, and assigns, determinable as aforesaid, It is hereby agreed and declared that the same is so limited to him and them upon the trusts, intents, and purposes following (that is to say), *Upon trust*, in case the said yearly rent-charge or sum of £——, or any part thereof, shall be unpaid by the space of forty days next after any of the said days of payment whereon the same is appointed to be paid as aforesaid, (although no formal or legal demand shall be made), then, so often as the same shall happen, the said [*vendor's trustee*], his executors or administrators, shall and do from time to time, by and

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And as to the lands subject to the rent,

To the use of vendor's trustee for ninety-nine years,

Remainder to use of purchaser's trustee

—in trust for purchaser.

Trusts of ninety-nine years' term.

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out of the rents and profits of the messuages, lands, tenements, and hereditaments comprised in the same term of ninety-nine years; or by demising, leasing, selling, or mortgaging the said premises or any of them, or any part thereof, for all or any part of the said term determinable as aforesaid; or by bringing actions against the tenants or occupiers of the same premises, or any of them, for the rents then in arrear; or by such other ways or means as to him or them shall seem meet, raise and levy such sum and sums of money as shall be sufficient from time to time to pay and satisfy the said yearly rent-charge or sum of £——, or so much thereof as shall from time to time happen to be in arrear and unpaid; together with all costs and expenses which the said [*vendor*] or his assigns, or the said [*vendor's trustee*], his executors, administrators, or assigns, shall sustain or be put unto by reason of the non-payment of the same yearly rent-charge or sum of £——, or any part thereof, at the days and times and in manner before appointed for payment thereof; and shall and do pay, apply, and dispose of the monies so to be levied and raised, in or towards payment and satisfaction thereof accordingly; And subject and without prejudice to the trusts aforesaid, shall and do stand possessed of and interested in the said messuages, lands, tenements, and hereditaments, for the residue of the said term of ninety-nine years determinable as aforesaid, and the rents and profits thereof, or so much of the same messuages, lands, tenements, and hereditaments, rents, and profits, as shall not be disposed of for the purposes aforesaid, *In trust* for the said [*purchaser*], his executors, administrators, and assigns. AND it is hereby agreed and declared between and by the said parties hereto, that the receipt or receipts of the said [*vendor's trustee*], his executors, administrators, or assigns, shall be a sufficient discharge for any sum or sums of money which shall come to his or their hands by virtue of these presents, unto the person or persons paying the same, for so much as in such receipt or receipts shall be expressed to be received; And that the person or persons paying such sum or sums of money, and taking such receipt or receipts for the same as aforesaid, shall not be bound to see to the application, or be answerable or accountable for the loss, misapplication, or non-application thereof, or of any part thereof.

Receipt of the trustee to be sufficient discharge.

BY TENANT FOR LIFE, IN CONSIDERATION OF A RENT-CHARGE.

AND the said [*purchaser*], for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said [*vendor*], his executors, administrators, and assigns, that he the said [*purchaser*], his heirs, executors, or administrators, shall and will pay or cause to be paid unto the said [*vendor*] and his assigns, during the natural life of him the said [*vendor*], the said annuity or yearly rent-charge of £——, free from taxes, and without any other deduction whatsoever, (except the land-tax as aforesaid (*b*),) at the place, days, and times, and in the manner and form hereinbefore limited and appointed for payment thereof. *And also*, that he the said [*purchaser*], his heirs, executors, or administrators, shall and will at all times hereafter save and keep harmless and indemnified the said [*vendor*], his heirs, executors, or administrators, of, from, and against all actions, suits, and other proceedings, which shall or may, in the event of the decease of the said [*purchaser*] in the lifetime of the said [*vendor*], be commenced, brought, or prosecuted against the said [*vendor*], his heirs, executors, or administrators, and from and against all loss, costs, damages, and expenses which he or they shall or may in that event sustain, expend, or be put unto, for or by reason or on account of any waste which shall or may, at any time or times hereafter during the life of the said [*vendor*], be done, committed, permitted, or suffered by the said [*purchaser*] or his assigns, or any other person or persons claiming or to claim by, from, through, or under him or them, in or upon the said messuages, lands, tenements, and hereditaments expressed to be hereby granted and released, or any part thereof. AND the said [*vendor*] for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said [*purchaser's trustee*], and his heirs, in manner following, (that is to say), that (notwithstanding any act, deed, matter, or thing whatsoever, done, executed, or suffered by the said [*vendor*], or by [*vendor's wife*], his late wife, deceased, to the contrary (*c*),) he the said [*vendor*], now at the time of the sealing and delivery hereof, is lawfully and rightfully seised of the messuages, lands, tenements, and hereditaments hereinbefore mentioned, and in-

Purchaser covenants to pay the annuity,

—to save the vendor harmless by reason of waste being committed.

Covenants by vendor,

—that he is seised for his life.

(*b*) But see an observation, *ante*, p. 23.

(*c*) The estate of the vendor was derived under his late wife's marriage settlement.

BY TENANT FOR LIFE, IN CONSIDERATION OF A RENT-CHARGE.

tended to be hereby granted and released, during the term of the life of the said [*vendor*], without any manner of condition, contingent proviso, power of limitation of any new or other use or uses, or any other restraint, matter, cause, or thing whatsoever, to alter, change, charge, revoke, make void, lessen, or determine the same; *And also* that (notwithstanding any such act, deed, matter, or thing as aforesaid), he the said [*vendor*] now, at the time of the sealing and delivery of these presents, hath in himself full power and lawful and absolute authority to grant, bargain, sell, and release the same messuages, &c. hereinbefore expressed to be hereby granted and released unto the said [*purchaser's trustee*] and his heirs, to the uses and in manner aforesaid, according to the true intent and meaning of these presents. *And further*, that the said messuages, &c. shall, and lawfully may, from time to time, and at all times during the life of the said [*vendor*], remain, continue, and be, to, for, and upon the uses, trusts, intents, and purposes hereinbefore limited and declared concerning the same; and shall and may be peaceably and quietly had, held, and enjoyed, and the rents and profits thereof received and taken accordingly, without the interruption, disturbance, or denial whatsoever, of, from, or by the said [*vendor*] or his assigns, or any other person or persons whomsoever, lawfully claiming by, through, from, or under the said [*vendor*], or the said [*vendor's wife*], his late wife, deceased; *And that* free and clear, and freely, clearly, and absolutely acquitted, exonerated, and discharged, or otherwise by him the said [*vendor*], his heirs, executors, and administrators well and sufficiently saved harmless and kept indemnified of, from, and against all and all manner of former and other gifts, grants, rights, titles, charges, and incumbrances whatsoever, made, done, executed, or suffered by the said [*vendor*], or by the said [*wife*], his late wife, or any other person or persons lawfully claiming by, from, through, under, or in trust for them or either of them. *And moreover*, that he the said [*vendor*], and every other person lawfully claiming by, from, or under the said [*vendor*] or the said [*wife*], his late wife, deceased, shall and will, at any time or times hereafter during the life of the said [*vendor*], at the request, costs, and charges of the said [*purchaser*], his heirs or assigns, make, do, acknowledge, levy, suffer, execute, and perfect, or cause and procure to be

That the vendor hath power to convey.

That premises shall remain to uses aforesaid,

—free from incumbrances.

And for further assurance.

made, done, acknowledged, levied, suffered, executed, and perfected, all such further lawful acts, deeds, conveyances, and assurances in the law whatsoever, for the more effectually granting, releasing, and assuring the said messuages, &c., or any of them, or any part thereof, to, for, and upon the uses, trusts, intents, and purposes aforesaid, during the natural life of the said [*vendor*], as by the said [*purchaser*], his heirs or assigns, or any of them, or his, their, or any of their counsel in the law, shall be reasonably devised or advised and required (*d*); so that such further assurances or any of them do not contain in them or imply any further or other or more general covenants or warranty than against the person or persons who shall be requested to make and execute the same, his, her, and their heirs, executors, and administrators, acts and deeds only; and so that the person or persons who shall be requested to make and execute such further assurance or assurances be not compelled or compellable, for the purpose of making or doing the same, to go or travel from his, her, or their then usual dwelling or place of abode, or respective dwellings or places of abode. IN WITNESS, &c.

BY TENANT FOR LIFE, IN CONSIDERATION OF A RENT-CHARGE.

(*d*) As to this *apparently* restrictive appendage to the covenant for further assurance, *vide ante*, Vol. 7, p. 465.

CONVEYANCE *of* FREEHOLDS. COVENANT *to* SURRENDER COPYHOLDS, *and* ASSIGNMENT *of* LEASEHOLDS *by a* TENANT *for* LIFE *and* REMAINDER-MAN; *the Heir-at-law of the late Owner as to the Freeholds and Copyholds, and the Executors and Trustees of the Will as to the Leaseholds, join, and also a former Vendor, for the Purpose of conveying some Parcels which were omitted in the Testator's Conveyance.*

FREEHOLDS, COPYHOLDS, AND LEASEHOLDS, BY TENANT FOR LIFE AND REMAINDER-MAN.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*devisee for life*] and [*devisee in remainder*]; and which said [*devisee for life*] and [*devisee in remain-*

Parties.

FREEHOLDS, COPYHOLDS, AND LEASEHOLDS, BY TENANT FOR LIFE AND REMAINDER-MAN.

der] are devisees and legatees named in the last will and testament of [*testator*], of ——, deceased, of the first part; [*executors*], of &c., the executors named in the said will, of the second part; [*heir-at-law*], the brother and heir-at-law of the said [*testator*], deceased, of the third part; [*former vendor*], of &c., of the fourth part; [*agent*] (*a*), of &c., of the fifth part; and [*purchaser*], of &c., of the sixth part.

Recital of lease.

WHEREAS, by indenture bearing date on or about the twenty-fifth day of May, 1820, and made between [*lessors*], of the first part; [A. B.], therein also described, of the second part; and the said [*former vendor*], of the third part; They the said [*lessors*], with the consent of the said [A. B.], did demise unto the said [*former vendor*] all that messuage or tenement and garden, with the barn, stables, and coach-houses, yard, and orchard thereto belonging; And all those three fields or closes of meadow or pasture land and orchard, to the said messuage or tenement belonging, containing together fifteen acres, be the same more or less; which said premises are therein mentioned to be situate in ——, in the county of ——, aforesaid, and then in the occupation of [*tenant*], with the appurtenances, except timber and timber-like trees as therein mentioned, and free ingress, egress, and regress for the said [A. B.], his heirs and assigns, to cut and carry away the same, *To hold* the same unto the said [*former vendor*], his executors, administrators, and assigns, from Michaelmas then last, for the term of thirty-one years, at the yearly rent of —— pounds, payable quarterly as therein mentioned, and subject to the covenants and agreements therein contained on the tenant's or lessee's part to be observed, kept, and performed:

Lease and release, and assignment.

AND WHEREAS, by indentures of lease and release, bearing date respectively on or about the sixteenth and seventeenth days of September, 1821, the release being made between the said [*former vendor*], of the first part; the said [*testator*], of the second part; and [*trustee*], of &c., of the third part; for the considerations therein mentioned, the messuage or tenement, gar-

(*a*) The purchase was made by an agent, who is joined in the deed for the purpose of acknowledging the agency. Any other mode of doing this would of course be sufficient.

FREEHOLDS, COPYHOLDS, AND LEASEHOLDS, BY TENANT FOR LIFE, AND REMAINDER-MAN.

den, stable, coach-house, and yard, and hereditaments hereinafter mentioned and described, and hereby released or intended so to be, were appointed and released or otherwise assured by the said [*former vendor*], (subject to a power of appointment which was never exercised, and to certain limitations unto and for the benefit of the said [*testator*], which determined at his decease (*b*), hereinafter mentioned, *To the use* of the said [*testator*], his heirs and assigns, for ever; And in and by the said indenture of release and assignment, the said [*former vendor*] did assign unto the said [*testator*], his executors, administrators, and assigns, ALL THAT *(describe*

As to recitals in deeds.

(*b*) We sometimes find, in recitals of deeds, limitations detailed at great length, which never arose, and which ought, if noticed at all, to be referred to with the utmost possible conciseness, and in such a manner as to prevent the attention of persons perusing the deed from being drawn to circumstances, which subsequent events have rendered immaterial, by which the labour of tracing the history of the title is unnecessarily increased. Much has been said in recent discussions, which the projected alterations in the law of real property have created, respecting the propriety of introducing recitals in deeds, and some gentlemen appear to think that they might be altogether dispensed with; but this would be impossible in some cases, and inconvenient in nearly all. Such part of the anterior documentary title as is requisite to shew the interests of the respective parties, accompanied with a clear and minute detail of all material extrinsic facts, of which the recitals in deeds often afford a valuable record, should be stated; and in no manner can this statement so conveniently be introduced as by way of recital, for the practice which formerly prevailed of throwing such statements into the subsequent parts of the deeds, which the disuse of recitals renders almost unavoidable, is not conducive to perspicuity. But let not these observations be misconstrued into a defence of the plan of incumbering deeds with long and intricate recitals not requisite to elucidate the actual state of the title, and often positively mischievous, by furnishing notice of deeds and circumstances, into which length of time would otherwise have rendered it unnecessary to inquire. The skill of the draftsman is more displayed in the judicious selection of the facts to be recited, and the succinctness and lucid arrangement of the recitals, than in any other part of the deed: his aim will be to reject all that is extraneous, and to state with perspicuity and precision all that is material. Some practitioners have succeeded in attaining these objects to a great extent, and have shewn that attention to stile is not inconsistent with a due regard to technical forms.

FREEHOLDS, COPYHOLDS, AND LEASEHOLDS, BY TENANT FOR LIFE AND REMAINDER-MAN.

leasehold parcels), To hold the same unto the said [*testator*], his executors, administrators, and assigns, for the then residue of the said term of thirty-one years, subject to the rents, covenants, and agreements contained in the said indenture of lease; AND WHEREAS the said fields or closes called ——, containing fifteen acres or thereabouts, comprised in the said indenture of lease of the twenty-fifth day of May, 1820, and the residue of the said term of thirty-one years therein, were included in the purchase made by the said [*testator*] of the said [*former vendor*], which he the said [*former vendor*] doth hereby admit, But, by mistake, the same premises were not assigned to the said [*testator*] by the said indenture of the seventeenth day of September, 1821; *(Recite testator's admission to copyholds);* AND WHEREAS the said [*testator*] duly made and published his last will and testament in writing, bearing date the fifth day of December, 1826, duly executed and attested for the devise of freehold estates, and thereby bequeathed unto his sister [M. T.], since deceased, an annuity of 105*l.*, and unto his brother [R. S.] an annuity of 100*l.*; and the said testator directed that, in case his personal estate should not be sufficient to satisfy the said annuities and sums of money, the same should be charged upon his real estate; and he did thereby give, devise, and bequeath all and singular his manors, messuages, lands, tenements, and hereditaments (*c*), unto [A. B.] and [C. D.] (*d*), their heirs and assigns, *To the use* of his wife, the said [*devisee for life*], for life, without impeachment of waste; with remainder *To the use* of his the said testator's trustees and their heirs, during her life, to preserve contingent remainders; with remainder (subject to an intervening remainder to the testator's child or children by his said wife, which did not take effect), *To the only use* of his nephew, the said [*devisee in remainder*], his heirs and assigns, for ever; And the said testator did there-

Mistake in the omission of part of leaseholds in the recited deed.

Recital of testator's will.

(*c*) That copyholds will pass under these words, though there has been no surrender to the use of the will, *vide Doe* d. *Clark* v. *Ludlam*, 7 Bing. 275, which has settled the point in a manner agreeably to the editor's anticipations, *vide* 2 Jarm. Pow. Dev. 124.

(*d*) As the estate was clearly vested in the wife and nephew under the devise to them, A. B. and C. D. are not made parties to the deed.

by bequeath unto the said [*executors*] all his leasehold messuages, lands, tenements, and hereditaments, *To hold* to them, their executors, administrators, and assigns, for the residue of his estate and interest therein, Upon trust to permit the same to be held and enjoyed by the person who should, for the time being, be entitled to the possession of his freehold estates, under the limitations thereinbefore contained; and the said testator did thereby appoint the said [*executors*], executors of his said will; AND WHEREAS the said [*testator*] duly made and published a codicil to his said will, which codicil bears date the third day of December, 1826, but did not thereby revoke or alter the several devises and bequests hereinbefore mentioned to be contained in the said will; and the said [*testator*] departed this life on or about the sixteenth day of September, 1828, leaving the said [*heir-at-law*], his eldest brother and heir-at-law; and soon after his decease the said [*executors*] duly proved the said will and codicil in the Prerogative Court of the Archbishop of Canterbury; AND WHEREAS the messuage, tenement, and barn expressed to be demised by the said recited indenture of the twenty-fifth day of May, 1820, having been pulled down and the materials removed by the said [*former vendor*], the lessors named in the said lease required the said [*testator*] to rebuild the said messuage or tenement and barn; AND WHEREAS, at a court holden in and for the manor of ——, in the parish of ——, aforesaid, on or about the twenty-ninth day of January, 1830, the said [*devisee for life*], as devisee for life under or by virtue of the said recited will, and the said [*devisee in remainder*], as devisee in remainder in fee-simple under or by virtue of the same will, were respectively admitted tenants of the copyhold or customary pieces or parcels of land and hereditaments hereinafter described, and intended to be hereby covenanted to be surrendered at the will of the lord, according to the custom of the said manor; AND WHEREAS the said [*agent*] hath contracted with the said [*devisee for life*] and [*devisee in remainder*], for the absolute purchase of the freehold hereditaments hereinafter described, and the inheritance thereof in fee-simple, and of the copyhold hereditaments hereinafter described, and the inheritance thereof, according to the custom of the said manor of [*manor*], and also of the leasehold premises hereinbefore mentioned, for

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Codicil.

Death of testator.

Waste on part of the leaseholds.

Admission of devisees to copyholds.

Contract by agent.

FREEHOLDS, COPYHOLDS, AND LEASEHOLDS, BY TENANT FOR LIFE AND REMAINDER-MAN.

the residue of the said term of thirty-one years therein, (but, nevertheless, as to the said leasehold premises, subject to the aforesaid claim by the lessors of the same premises, for rebuilding the said messuage or tenement and barn, so removed as aforesaid), at or for the price or sum of 3,000*l.*; AND WHEREAS the said [*agent*] purchased the said freehold, leasehold, and copyhold hereditaments respectively, as the agent for and on the behalf of the said [*purchaser*]; AND WHEREAS, in order that a distinct consideration for the said freehold and leasehold, and for the said copyhold hereditaments, may be set forth in or upon the principal or only instrument of conveyance relating thereto respectively, the said purchase money or sum of 3,000*l.* hath been apportioned in manner hereinafter mentioned, that is to say, the sum of 2,600*l.* as and for the price or consideration money for the purchase of the freehold and leasehold hereditaments, and the sum of 400*l.*, other part thereof, as and for the price or consideration money for the purchase of the copyhold hereditaments; AND WHEREAS the freehold, copyhold, and leasehold hereditaments hereinafter described and expressed to be hereby released, and covenanted to be surrendered, have been exonerated from the payment of the said annuities of 10*5l.* and 100*l.*, by the said recited will bequeathed to the said [*annuitants*] respectively as aforesaid; AND WHEREAS the said [*heir*] hath consented to join in the assurance of the said freehold and copyhold hereditaments purchased by the said [*purchaser*] as aforesaid; and the said [*former vendor*] hath agreed to assign so much of the leasehold premises comprised in the hereinbefore recited indenture of lease, as was omitted and left out of the hereinbefore recited indenture of assignment as aforesaid. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said recited contract, and in consideration of the sum of 2,600*l.* of lawful money of Great Britain and Ireland (being the part of the said sum of 3,000*l.* apportioned as the price or consideration for the purchase of the said freehold and leasehold hereditaments as aforesaid), to the said [*devisee for life*] and [*devisee in remainder*] paid by the said [*purchaser*] at or before the sealing and delivery of these presents, with the consent of the said [*agent*] (testified by his executing these presents), the receipt of which said sum of 2,600*l.* they the said [*devisee*

Agent purchased for principal.

Apportionment of the consideration.

Annuities paid off.

Testatum.

for life] and [*devisee in remainder*] do hereby respectively acknowledge, and from the same do, and each of them doth, release and discharge the said [*purchaser*], his heirs, executors, and administrators for ever, by these presents, And also in consideration of the sum of 10*s.* of lawful money aforesaid to the said [*heir*] paid by the said [*purchaser*], at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, They the said [*devisee for life*] and [*devisee in remainder*], with the consent of the said [*agent*], (testified as aforesaid), *have*, and each of them *hath*, granted, bargained, sold, released, and confirmed, And by these presents *do*, and each of them *doth* &c.; And the said [*heir*], at the request of the said [*devisee for life*] and [*devisee in remainder*], (testified as aforesaid), *hath*, by way of assurance only, and not of warranty or covenant, bargained, sold, and released, and by these presents *doth* bargain, sell, and release unto the said [*purchaser*], (in his actual possession (*e*), &c.), and to his heirs, ALL THAT (*describe freehold premises*), And all houses, &c., And the reversion,

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Devisees, and also the heir, with the consent of the agent, convey.

Freehold premises.

(*e*) The bargain and sale for a year should be made by the tenant for life and heir.

As to the necessity of a lease for a year.

But where tenant for life and reversioner or remainder-man join in conveying the entire fee-simple, a lease for a year is unnecessary, for the Courts, in order to give effect to the intention, would no doubt construe the deed as operating first as a grant of a reversion or remainder, and then as a surrender of the estate for life; see 2 Roll. Ab. 498, (K), pl. 2; and it would be proper to frame the deed accordingly. The conveying part would then run as follows:—

"The said [*reversioner* (or *remainder-man in fee*)] as to, for, and concerning the reversion [*or*, remainder] in fee-simple, expectant on the determination of the said estate for life of the said [*tenant for life*], of and in the said —— and hereditaments hereinafter described, *Hath* granted, bargained, sold, and confirmed, and by these presents *Doth* grant, &c. And the said [*tenant for life*], as to, for, and concerning his estate for life of and in the said —— and hereditaments, and to the intent that such estate for life may be extinguished in the reversion [*or*, remainder], and inheritance in fee-simple of the same hereditaments, *Hath* bargained, sold, surrendered, and yielded up, and by these presents *Doth*

Variation where tenant for life surrenders.

FREEHOLDS, COPYHOLDS, AND LEASEHOLDS, BY TENANT FOR LIFE AND REMAINDER-MAN.

Habendum.

&c., And all the estate, &c., And all deeds, &c. To HAVE AND TO HOLD the said messuage or tenement, pieces or parcels of land, hereditaments, and all and singular other the premises hereinbefore described and expressed to be hereby granted and released, with their appurtenances, unto the said [*purchaser*], his heirs and assigns, for ever, To THE USE of the said [*purchaser*], his heirs and assigns, for ever (*f*).

Further *testatum.*

AND THIS INDENTURE FURTHER WITNESSETH, that, in further pursuance of the said recited contract, And in consideration of the said sum of 2,600*l.* (being the part of the said sum of 3,000*l.*, apportioned as the price of, or consideration for, the purchase of the said freehold and leasehold hereditaments), so paid by the said [*purchaser*] to the said [*legatee for life*] and [*legatee in remainder*] as aforesaid, with the consent of the said [*former vendor*] and [*executors*], testified by their severally executing these presents, and in consideration of the sum of 10*s.* of lawful money of Great Britain and Ireland, to the said [*former vendor*] and [*executors*] paid by the said [*purchaser*] at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, He the said [*former vendor*], at the request of the said [*legatee for life*], [*legatee in remainder*], and [*executors*], and with the consent of the said [*agent*], (testified as aforesaid), As to so much and all such part or parts of the said —— and premises demised by the hereinbefore recited indenture of lease of the twenty-fifth day of May, 1820, as is or are not comprised or included in the hereinbefore recited indenture of assignment of the seventeenth day of September, 1821, *hath* bargained, sold, assigned, and transferred, and by these presents *doth*

Assignment of leaseholds by legatees, executors, and former vendor.

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bargain, &c. unto the said [*purchaser*], his heirs and assigns, ALL THAT," &c.

The precedent in the text, however, exhibits the most frequently adopted mode of conveying lands by a tenant for life and reversioner or remainder-man. Its advantage over the mode just pointed out is, that, if, by reason of the existence of an outstanding intervening estate, in trustees to preserve contingent remainders, or otherwise, the estate for life could not pass by surrender, it would nevertheless be vested in the purchaser by the lease and release.

(*f*) Or to uses to prevent dower, *ut ante*, Vol. 7, p. 461.

bargain, &c.; And the said [*executors*], at the request of the said [*legatee for life*] and [*legatee in remainder*] (testified as aforesaid), As to the residue of the —— and premises hereinafter described and hereby assigned, *have*, and every of them *hath*, bargained, sold, assigned, and transferred, And by these presents *do*, &c.; And the said [*legatee for life*] and [*legatee in remainder*], *have*, and each of them *hath*, granted, bargained, sold, and confirmed, and by these presents *do*, and each of them *doth* grant, &c. unto the said [*purchaser*], his executors, administrators, and assigns, All and singular the —— and premises comprised in and demised by the hereinbefore recited indenture of lease of the twenty-fifth day of May, 1820, And all the estate, &c., To HAVE AND TO HOLD the said ——, and all and singular other the premises expressed to be hereby assigned unto the said [*purchaser*], his executors, administrators, and assigns, henceforth for and during all the residue now to come and unexpired of the said term of thirty-one years, granted by the said indenture of lease of the twenty-fifth of May, 1820, as aforesaid, subject nevertheless to the payment of the rent of £——, and to the performance of the covenants and agreements thereby reserved and contained, and henceforth on the tenant's or lessee's part to be paid, observed, and performed, and, subject to such claims as aforesaid of the lessors named in the said lease, to rebuild the said messuage or tenement so pulled down and removed as aforesaid. *(Covenant by former owner and executors, that they have not incumbered)* (*g*). AND THIS INDENTURE FURTHER WITNESSETH, that, in further pursuance of the said recited agreement, and in consideration of the sum of 400*l.* of lawful money of Great Britain and Ireland, (being the part of the said sum of 3000*l.* apportioned as the price of or consideration for the purchase of the copyhold hereditaments

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Habendum.

Further *testatum.*

(*g*) In this instance, the former owner covenanted only that he had not incumbered; though it should seem rather more correct that a person who conveys parcels omitted by mistake in a former conveyance, should enter into the same covenants as were contained in the conveyance in which the parcels were omitted to be inserted, and which covenants, in the present instance, would be the ordinary limited covenants for title, as the vendor seems to have been beneficial owner.

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hereinafter covenanted to be surrendered), paid by the said [*purchaser*] to the said [*devisee for life*] and [*devisee in remainder*], at or before the sealing and delivery of these presents, with the consent of the said [*agent*], testified as aforesaid; the receipt of which said sum of 400*l.* the said [*devisee for life*] and [*devisee in remainder*] do hereby respectively acknowledge, and from the same do, and each of them doth, release and discharge the said [*purchaser*], his heirs, executors, and administrators for ever, by these presents, The said [*devisee for life*], [*devisee in remainder*], and [*heir-at-law*], do hereby for themselves severally, and for their respective heirs, executors, and administrators, covenant and agree with the said [*purchaser*], his heirs and assigns, that the said [*devisee for life*], [*devisee in remainder*], and [*heir*], and all other necessary parties, shall and will forthwith, as soon as conveniently may be, at the request, costs, and charges of the said [*purchaser*], his heirs, executors, administrators, or assigns, surrender or cause to be surrendered into the hands of the lord or lords, lady or ladies for the time being of the said manor of B., according to the custom of the same manor, *All that* &c., *(copyhold parcels)*, To THE USE of the said [*purchaser*], his heirs and assigns, for ever, at the will of the lord, according to the custom of the said manor. AND the said [*devisee for life*], for himself, his heirs, executors, and administrators, and as to, for, and concerning the said freehold, leasehold, and copyhold hereditaments and premises hereby granted, released, and assigned, and covenanted to be surrendered, or intended so to be, during the life of the said [*devisee for life*], and as to the estate, right, title, quiet enjoyment, freedom from incumbrances, and further assurance of such his life estate therein, but so nevertheless as to the leasehold premises as not to extend beyond the residue of the said term of thirty-one years granted thereof as aforesaid; And the said [*devisee in remainder*], as to, for, and concerning the said freehold, copyhold, and leasehold hereditaments and premises, after the decease of the said [*devisee for life*], and as to the estate, right, title, quiet enjoyment, freedom from incumbrances, and further assurance of the remainder in fee-simple, expectant on the decease of the said [*devisee for life*], of and in the freehold and copyhold hereditaments, and the residue, if any, which shall be then

Covenant to surrender copyholds by devisees and heir.

Covenants by devisee for life, and devisee in remainder, each as to his interest.

unexpired of the said term in the said leasehold premises (*h*), do respectively hereby covenant and agree with the said [*purchaser*], his appointees, heirs, executors, administrators, and assigns, in manner following, (that is to say), That, for and notwithstanding any act, deed, matter, or thing by the said [*devisee for life*] and [*devisee in remainder*], or either of them, or by the said [*testator*] deceased, made, done, permitted, or suffered, to the contrary, They the said [*de-*

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As to seisin of the freehold and copyhold.

(*h*) Variations in covenants by tenant for life and remainder-man—

Variation in covenants where one covenantor has an undivided moiety for life only, and the other covenantor the remaining moiety for life, and the entirety in remainder.

"And the said [*tenant for life*] doth hereby, for himself, his heirs, executors, and administrators, as to one undivided moiety, during his life, of the said —— and hereditaments, expressed to be hereby granted and released; and as to the estate, right, title, quiet enjoyment, and further assurance of such life estate, but no further or otherwise; And the said [*remainder-man*] doth hereby, for himself, his heirs, executors, and administrators; and as to the entirety of the said messuages, &c., with the appurtenances, (subject as to a moiety to the life estate intended to be hereby released of the said [*tenant for life*]); and as to the estate, right, title, quiet enjoyment, and further assurance thereof, subject as aforesaid."

Further variation where one covenantor has a life estate in the entirety, and the remainder in fee in onemoiety, and the other covenantor has the remainder in fee in the remaining moiety.

"And the said [*first covenantor*] doth hereby, for himself, his heirs, executors, and administrators, as to one undivided moiety of the said hereditaments hereinbefore expressed to be hereby granted and released for an estate in fee-simple; and for the estate, right, title, quiet enjoyment, freedom from incumbrances, and further assurance of the same moiety; and also as to the remaining moiety thereof during his life only; and for the estate, right, title, quiet enjoyment, freedom from incumbrances, and further assurance of the said remaining moiety during his life; and the said [*second covenantor*] doth hereby, for himself, his heirs, executors, and administrators; and as to the same remaining moiety of the said hereditaments, after the decease of the said [*first covenantor*], and for the estate, right, title, quiet enjoyment, freedom from incumbrances, and further assurance of or respecting such remaining moiety of the said hereditaments in remainder in fee-simple, expectant on the de-

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visee for life], [*devisee in remainder*], and [*heir*], or some or one of them, now at the time of the sealing and delivery of these presents, are or is lawfully, rightfully, and absolutely seised of the said freehold messuage or tenement, pieces or parcels of land, and hereditaments hereinbefore described and expressed to be hereby granted and released, and the inheritance thereof in fee-simple; And also are or is seised of the said copyhold hereditaments hereby covenanted to be surrendered, for an absolute estate of inheritance, according to the custom of the said manor of [B.], without any manner of condition, contingent proviso, trust, power of revocation, or limitation of any new or other use or uses, or any other restraint, cause, matter, or thing, to alter, change, charge, revoke, make void, lessen, incumber, or de-

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cease of the said [*first covenantor*], covenant and agree with the said [*purchaser*]," &c.

Remarks upon the mode of framing covenants by persons having various interests.

Where, however, the nature of the interests of the covenantors is such as to render it inconvenient to specify them in the covenant, and, indeed, in other cases where brevity is an object, reference may be made to the interests of the parties thus:—

"And the said [*covenantors*], as to, for, and concerning their said respective parts, shares, and interests of and in the said hereditaments, and no further or otherwise."

This form supposes that the estates of the covenantors will have been, as they ought to be, distinctly described in the antecedent parts of the deed; but, even then, it is generally better to repeat the statement at the commencement of the covenant, in order to make the covenants complete in themselves without reference to the context, which tends greatly to simplify the pleadings in actions on the covenants. And this object may generally be effected in very few words. Thus, the covenant by a tenant for life and reversioner or remainder-man, instead of the longer form in the text, may be expressed as follows:—

Shorter form of covenants by tenant for life and remainder-man.

"And the said [*tenant for life*], as for and concerning the estate for life to which he claims to be entitled in the said hereditaments hereby released; and the said [*reversioner*, (or *remainder-man*)], as for and concerning the inheritance in fee-simple in reversion [*or* remainder], therein expectant on the said estate for life, do for themselves respectively, and their respective heirs, &c., covenant," &c.

termine the same freehold and copyhold hereditaments respectively; *And also* that for and notwithstanding any such act, matter, or thing as aforesaid, the said recited indenture of lease, of the twenty-fifth day of May, 1820, is a good and sufficient lease, valid in the law, of and for the said premises hereby assigned, or intended so to be, and is not forfeited, surrendered, or in anywise rendered void or voidable; *And also*, that for and notwithstanding any such act, matter, or thing as aforesaid, the said [*devisee for life*], [*devisee in remainder*], [*heir*], [*executors*], and [*former owner*], some or one of them, now, at the time of the sealing and delivery of these presents, have or hath in themselves, himself, or herself, good right, full power, and absolute authority to grant, release, surrender, and assure the said freehold and copyhold hereditaments, with their respective appurtenances, unto and to the use of the said [*purchaser*], his heirs and assigns, for ever(*i*), in the manner hereinbefore expressed concerning the same premises respectively, and to assign the said leasehold hereditaments and premises with their appurtenances unto the said [*purchaser*], his executors, administrators, and assigns, for all the now residue of the said term of thirty-one years therein in manner aforesaid, and according to the true intent and meaning of these presents; *And further*, that it shall be lawful for the said [*purchaser*], his heirs and assigns, from time to time, and at all times hereafter, to hold and enjoy the said freehold and copyhold hereditaments and premises hereby respectively released and covenanted to be surrendered, with their respective appurtenances, and to receive and take the rents and profits thereof; And also for the said [*purchaser*], his executors, administrators, and assigns, from time to time and at all times hereafter during the continuance of the said term of thirty-one years, to hold, possess, and enjoy the said leasehold hereditaments and premises respectively hereby assigned or intended so to be, and to receive and take the rents and profits thereof, without any interruption or disturbance of, from, or by the said [*devisee for life*] and [*devisee in remainder*], or either of them,

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Lease is good.

Power to release freeholds, surrender copyholds, and assign leaseholds.

Quiet enjoyment.

(*i*) Or if to uses to prevent dower—

"to the uses hereinbefore declared."

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or of, from, or by any other person or persons lawfully claiming by, from, through, under, or in trust for them or either of them, or the said [*testator*], deceased (*k*), subject

As to the extent of a vendor's covenants for the title.

(*k*) In preparing conveyances from vendor to vendee, the extent of the covenants for title to be entered into will necessarily engage the conveyancer's attention. Where the vendor himself acquired the property as vendee, the covenants should be confined to his acts. Where the property was not purchased by the vendor, but by a deceased owner, from whom the same devolved to the vendor by devise or descent, his covenants should extend to the acts of such deceased owner. See *Pickett* v. *Loggon*, 14 Ves. 239. If the property were derived by the vendor from the last purchaser for valuable consideration, through several descents or wills, the covenants should extend to the acts of all the intermediate owners, though, it seems, that the rule of the Court of Chancery is to confine it to the owner who immediately preceded the vendor. *Lloyd* v. *Griffith*, 3 Atk. 267; *Wakeman* v. Duchess of *Rutland*, 3 Ves. 236. And Sir E. B. Sugden observes, Vend. & Purch. 8th edit. 472, that a person claiming under a voluntary conveyance is considered in the same light as a devisee; but not, it is conceived, if the voluntary conveyance contained covenants for title. The reason why a vendee is entitled to covenants extending to the acts of all the vendor's ancestors and testators from the last purchaser for valuable consideration, must be, that none of these owners could have entered into covenants for title, and not that the estate passed from them without a valuable consideration. However, it seldom happens that settlements purely voluntary contain such covenants.

Whatever be the extent of the covenants entered into by a vendor, care should be taken in preparing them, that they are all made co-extensive; for inconsistencies of this kind are of frequent occurrence, and have given rise to much litigation. The rules to be drawn from the cases on the subject are laid down by Sir E. B. Sugden, in his treatise on Vendors & Purchasers, 8th edit. p. 578, with his usual clearness and precision, though one of the positions of this eminent writer is contradicted by a recent decision, which seems to have eluded his research. The distinction taken by the learned author is, that where restrictive words are inserted in the first of several covenants having the same object, they will be construed as extending to all the covenants, although they are distinct; for which he cites the following cases: *Nervin* v. *Munns*, 3 Lev. 46; *Browning* v. *Wright*, 2 Bos. & Pull. 13; *Broughton* v. *Conway*, Dyer, 240; *Howell* v. *Richards*, 11 East, 633; *Nind* v. *Marshall*, 1 Brod. & Bing. 319: but that, where the first covenant is general, a subsequent limited covenant will not restrain the generality of the preceding covenant, unless an express inten-

nevertheless, as to the said copyhold hereditaments, to the customary rents and services henceforth to become due in

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tion so to do appear, or the covenants be inconsistent. Thus, in *Gainsford* v. *Griffith*, 1 Saund. 58; 1 Sid. 328; see 2 Bos. & Pull. 23, 25; 1 Brod. & Bing. 321, on an assignment of a leasehold estate, the vendor covenanted that the lease was a good, certain, perfect, and indefeasible lease in the law, and so should remain during the residue of the term; and that the purchaser, his executors, administrators, and assigns, should quietly enjoy the premises without any let, denial, &c. by the vendor, his executors or assigns, and acquitted or otherwise saved harmless of all incumbrances committed by the vendor; and it was holden, that the generality of the preceding covenant was not restrained by the latter covenant. And in *Norman* v. *Foster*, 1 Mod. 101, Lord C. J. *Hale*, said—If I covenant that I have a lawful right to grant; and that you shall enjoy, notwithstanding any claiming under me; these are two several covenants, and the first is general, and not qualified by the second. And to this *Wylde*, J., agreed; and he said, that one covenant went to the title, and the other to the possession. So, in the late case of *Hesse* v. *Stephenson*, 3 Bos. & Pull. 565, where, on an assignment of certain shares of a patent right, the assignor covenanted that he had good right, &c. to convey the shares, and that he had not by any means, directly or indirectly, forfeited any right or authority he ever had or might have had over the same, it was decided that the generality of the first covenant was not restrained by the latter covenant: Lord *Alvanley* said, that the covenant, instead of being framed in the usual and almost daily words, where parties intend to be bound by their own acts only, *viz.* "for and notwithstanding any act by him done to the contrary," omitted them altogether. The omission of these words was almost of itself decisive. The attention of the purchaser was not called by any words to the intent of the vendor to confine his covenant to his own acts. The Court ought not to indulge parties in leaving out words which are ordinarily introduced, and by which the real meaning of the parties might be plainly understood.

Whether a restricted covenant will restrain a preceding more general one.

But the doctrine, that a subsequent covenant will not restrain the generality of the preceding one, though apparently well supported by these authorities, was departed from in the late case of *Milner* v. *Horton*, M'Clel. 647, where it appeared that, by indenture of feoffment, dated 12th February, 1812, Dame Henrietta Horton, relict of Sir Watts Horton, Bart., and Henrietta Susan Ann Horton, conveyed to the plaintiff in fee certain hereditaments, covenanting (without the usual qualifying words "for and notwithstanding, &c."), that they were, or one of them was lawfully seised in fee, and had good right to grant in manner afore-

General covenant held to be restrained by a subsequent limited one.

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respect thereof, and as to the said leasehold premises to the payment of the rent, and the observance and performance of

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said, and that the plaintiff, performing the covenants therein contained on his part, should quietly hold and enjoy the premises and receive the rents thereof, "without any let, suit, eviction, or disturbance *of or by the said Dame H. Horton, or H. S. Ann, or their heirs, or any other person or persons claiming or to claim by, from, or under them or any of them, in anywise,*" and that the said premises should remain to the plaintiff in fee, discharged by the grantors, their heirs, &c., from all incumbrances executed "*by them the said Dame H. Horton, and H. S. Ann, or by the said Sir Watts Horton, deceased, or any of his ancestors, or by or with their, her, or his, or any of their means, consent, privity or procurement.*" It appeared that, previously to the feoffment, Sir Watts Horton in his lifetime had granted a redeemable rent-charge out of the property, the owner of which distrained on the purchaser*, who then brought an action against Lady Horton on her covenants. The plaintiff's title to recover depended upon the construction of the two first covenants, whether they were absolute and unqualified, as construed independently they clearly were, or whether they were restrained by the subsequent covenant for quiet enjoyment to the acts of the grantors: and the Court decided in favour of the latter construction. Mr. Baron *Graham*, who delivered the opinion of the Court, after citing the cases of the Duke of *Northumberland* v. *Errington*, 5 Durn. & East, 522; and *Browning* v. *Wright*, 2 Bos. & Pull. 13, said—"Having gone through the particulars of this indenture, we think it was the evident intention of the vendors to bind themselves by the two first covenants, that the vendees should have a good estate in fee-simple, *so far as vested in them.* It appears to us, that those covenants should be taken in conjunction with that for quiet enjoyment, without any let or disturbance by the parties, or either of them, or their heirs, or any person or persons claiming under them, or either of them; and that you are not to detach a part of the deed which answers your purpose, and give it a construction independent of, and inconsistent with, the remainder of the provisions."

Remarks upon *Milner* v. *Horton.*

It is to be lamented that in this case, though argued on the part of the plaintiff by the very profound lawyer now at the head of the Court of Common Pleas, the cases of *Gainsford* v. *Griffith*, *Norman* v. *Foster*, and

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* It is clear that the action might have been maintained upon the covenant against incumbrances, which extended to the acts of Sir Watts Horton, but a defect in the pleadings prevented the plaintiff from recovering upon this covenant.

the covenants and conditions reserved and contained by and in the hereinbefore recited indenture of lease of the twenty-fifth

Hesse v. *Stephenson*, were not brought before the attention of the Court, a circumstance which certainly weakens its authority.

Observations upon the covenants for title.

The association of an unqualified covenant, that the vendor has power to convey, with a restricted covenant, for the purchaser's peaceable enjoyment, is certainly rather extraordinary, since no eviction could happen without a defect in the vendor's title, involving a breach of the former covenant, unless such eviction proceeded from the vendor himself, or his representatives; the possibility of which event, however, prevents the two covenants, in such a case, from being absolutely incongruous. But a qualified covenant as to the power to convey may well consist with an absolute covenant for quiet enjoyment; for there may be a defect of title without an interruption of the enjoyment. And a vendor may reasonably be supposed to say—"Though I will not engage for the strict legal perfection of my title, yet I am confident that the defects in it are not such as will occasion an interruption of your enjoyment, and will therefore warrant that enjoyment against all the world." See *Howell* v. *Richards*, 11 East, 633. But it should seem, according to the case of *Nind* v. *Marshall*, 1 Brod. & Bing. 319, that the usual qualifying words at the commencement of a series of covenants—"notwithstanding &c."—will restrain a covenant for quiet enjoyment, though the terms of the covenant are quite general, unless, in addition to the generality of those terms, the intention that it shall be unrestricted farther appears by the introduction of an exception which relates to an incumbrance that is out of the scope of the covenant if otherwise construed.

From the preceding observations it will be seen how important are the two first in the series of vendor's covenants; namely, that he is seised and has right to convey, and that a purchaser ought not, as, on account of the smallness of the purchase, and the consequent desire to avoid expense, he sometimes is disposed to do, to rest his security on the covenant for quiet enjoyment alone, whereby he loses the advantage which the covenants in question would give him, of being able to sustain an action immediately on the discovery of a defect of title, without waiting until his possession has been actually disturbed—a point which may often be of great importance. The first covenant, however, that the grantor is seised, may safely be and not uncommonly is omitted, being included in the second, that the grantor has power to convey; which, in fact, is more comprehensive, since it applies to cases to which the former is not applicable—as in the instance of a vendor having a power of appointment only, and not an estate, and, moreover, has been held to extend to personal competency, as well as to capacity in point of estate. Thus, where a conveyance was

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day of May, 1820, and henceforth on the lessee's part to be paid, observed, and performed; *And that,* free and clear, and freely, clearly, and absolutely acquitted, exonerated, and discharged, or otherwise by the said [*devisee for life*] and [*devisee in remainder*], or one of them, their, or one of their heirs, executors, or administrators, effectually kept harmless and indemnified of, from, and against all and all manner of former and other estates, titles, charges, and incumbrances whatsoever, made, done, executed, occasioned, or suffered by the said [*devisee for life*] and [*devisee in remainder*], or either of them, or by the said [*testator*], deceased, or any person or persons lawfully claiming by, from, through, under, or in trust for them or any of them, or by or through their or any of their acts, default, privity, consent, or procurement, save and except, as to the leasehold premises, such claim as aforesaid of the said [*lessors*] for the rebuilding the said messuage or tenement and barn, so pulled down and removed as aforesaid; *And moreover*, that they the said [*devisee for life*] and [*devisee in remainder*] respectively, and their respective heirs, executors, and administrators, and all and every other person and persons lawfully claim-

Free from incumbrances.

Further assurance.

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made by a man and wife, and the husband covenanted that they had good right to convey, and the wife was under age, this was decided to be a breach of the covenant. *Nash* v. *Ashton*, Sir T. Jones, 195. The same exact point, of course, can only arise when the covenant relates to the acts of some person or persons other than the covenantor himself; for, in regard to his own acts, the infancy which prevented the operation of the grant of the party would be equally fatal to the obligatory force of the covenant.

As to the covenants, where there is a known defect of title.

In regard to covenants for title, it is a correct, though not a new observation, that they ought never to be relied on as affording protection against an incumbrance, of which the purchaser has notice; for it seems to be doubtful whether they would extend to such an incumbrance, (see *Ogilvie* v. *Foljambe*, 3 Mer. 65), unless it be particularly specified; and this specification it would not be advisable to make, unless the incumbrance otherwise appeared upon the face of the conveyance. In such a case an indemnity should be taken in a separate instrument, and the covenants in the conveyance will be framed in the usual manner: *Vide Form of Bonds of Indemnity from Vendor to Purchaser, ante,* Vol. 3, p. 350: but a covenant is in general to be preferred to a bond, because a bond does not run with the land.

ing any estate, right, title, or interest, in, to, or out of the said freehold, copyhold, and leasehold hereditaments and premises respectively hereby released, assigned, and covenanted to be surrendered as aforesaid, or any of them, or any part thereof respectively, by, from, through, or under them, or either of them, or the said [*testator*], deceased, shall and will from time to time, and at all times hereafter, upon every reasonable request, and at the costs and charges of the said [*purchaser*], his heirs, executors, administrators, or assigns, make, do, acknowledge, levy, suffer, and execute, or cause and procure to be made, done, acknowledged, levied, suffered, and executed, All such further acts, deeds, matters, and things, conveyances and assurances in the law whatsoever, for the more effectually granting, releasing, surrendering, assigning, and assuring the said freehold, copyhold, and leasehold hereditaments and premises respectively hereby released, assigned, and covenanted to be surrendered, with their and every of their appurtenances, unto and to the use of the said [*purchaser*], his heirs, executors, administrators, and assigns, or otherwise as he or they shall direct, be the same by fine, feoffment, common recovery, deed inrolled or not inrolled, or any other matter of record or not of record, or otherwise howsoever, As by the said [*purchaser*], his heirs, executors, administrators, or assigns, or his or their counsel in the law, shall be reasonably required, so that such further assurance or assurances contain or imply no further or other warranty or covenant than against the person or persons who shall be required to make and execute the same, his, her, and their heirs, executors, and administrators, acts and deeds only; And so that the person or persons who shall be required to make and execute such further assurance or assurances be not compelled or compellable, for the making or doing thereof, to go or travel from his, her, or their usual place or places of residence or abode. And the said [*purchaser*] doth hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said [*devisee for life*], [*devisee in remainder*], and [*executors*], and each and every of them, their, and each and every of their executors and administrators, That he the said [*purchaser*], his heirs, executors, administrators, or assigns, shall and will

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Purchaser covenants to pay rent and perform covenants of lease.

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at all times hereafter during the continuance of the said term of thirty-one years, pay the said yearly rent of £—— by the said indenture of lease of the twenty-fifth day of May, 1820, reserved and made payable, and perform and observe all and every the covenants and agreements in the same indenture of lease contained, and which henceforth on the tenant's or lessee's part are or ought to be paid, performed, and observed, according to the purport of the same indenture; *And that* he the said [*purchaser*], his executors, administrators, or assigns, or some or one of them, shall and will, at all times hereafter, effectually save harmless and keep indemnified the said [*devisee for life*], [*devisee in remainder*], and [*executors*], and every of them, their and every of their executors and administrators, and the heirs, executors, and administrators for the time being of the said [*testator*], deceased, of, from, and against the said rents and covenants respectively reserved and contained by and in the said indenture of lease, and every breach, default, or neglect, of or in the payment of or performance thereof, which shall at any time or times hereafter happen to be made or done; And also of, from, and against all actions, suits, and other proceedings, which can, shall, or may be had, brought, commenced, or prosecuted for or by reason or means or on account of the said messuage or tenement and barn, demised by the said indenture, having been pulled down and removed as aforesaid, or in consequence of the same not having been rebuilt, and of, from, and against all costs, charges, damages, and expenses, which shall or may be incurred or sustained by reason or on account of any such action, suit, or other proceeding to be had, brought, or prosecuted as aforesaid. IN WITNESS, &c.

—to indemnify vendors against certain dilapidations.

BY THREE OF FOUR CO-HEIRS, THE OTHER BEING AN INFANT.

RELEASE *by three of four* CO-HEIRS, *(the other being an Infant), of their three undivided Fourths.* COVENANT *that the* INFANT CO-HEIR *shall convey his Share (a) when of age.* DECLARATION *of the* USES *of a* FINE *to be levied by two of the* CO-HEIRS *and their* HUSBANDS. *(Variation where Purchaser retains the Infant Co-heir's Share of the Purchase-Money, and covenants to pay it to him on his executing a Conveyance of his Share).*

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*first vendor*], of &c., and [C. D.], his wife, one of the two surviving sisters of [A. B.], late of ——, deceased; [*second vendor*], of &c., and [E. F.], his wife, the other surviving sister of the said [A. B.]; [*third vendor*], of &c., eldest son and heir of [G. H.], late of ——, deceased, one other of the sisters of the said [A. B.]; which said [C. D.], [E. F.], and [*third vendor*], together with [*infant*], an infant under the age of twenty-one years, *viz.* of the age of twenty years, or thereabouts, the eldest son and heir-at-law of [I. K.], late of ——, one other of the sisters of the said [A. B.], are the co-heirs of the said [A. B.] deceased, of the first part; [*purchaser*], of &c., of the second part; and [*trustee*], of &c., of the third part. WHEREAS, by indentures of lease and release, bearing date respectively the —— and —— days of ——, which was in the year of our Lord ——, and made or intended to be made between [R. S.] and [*wife*], his wife, of the one part, and the said [A. B.], of the other

Parties.

Recital of conveyance to late owner.

(a) Sometimes, when an infant's share in an estate is sold together with others, it is included in the deed of conveyance, and he is made a conveying party in respect of that share, and executes the deed when he comes of age, the time of his execution being noticed in the memorandum of attestation. This avoids the expense of an additional conveyance.

As to including the infant's share in the conveyance.

BY THREE OF FOUR CO-HEIRS, THE OTHER BEING AN INFANT.

part, and by a fine *sur cognizance de droit come ceo*, &c., levied by the said [R. S.] and [*wife*], his wife, in pursuance thereof, All and singular the —— and hereditaments hereinafter mentioned, three undivided fourth parts whereof are hereby released, or intended so to be, were conveyed and assured unto and to the use of the said [A. B.], his heirs and assigns for ever. AND WHEREAS the said [A. B.] has since departed this life, having duly made and published his last will and testament in writing, bearing date on or about the —— day of ——, which was in the year ——, whereby he ordered that all his just debts should be paid, and with the payment thereof did charge all his estate; And, subject thereto, the said [*testator*] gave, devised, and bequeathed All his lands, tenements, and hereditaments, goods, chattels, real and personal estate, of what nature or kind soever, and wheresoever, unto his said wife, [F. B.], her heirs, executors, administrators, and assigns, to her and their own use and benefit absolutely for ever. AND WHEREAS the said [F. B.], the wife of the said [A. B.], died in his lifetime (*b*), and upon the decease of the said [A. B.], the inheritance in fee-simple of the said premises, (charged with the payment of his said debts), descended to and vested in the said [C. D.], [E. F.], [*third vendor*], and [*infant*], as co-heirs at law of the said [A. B.]. AND WHEREAS, for the purpose of raising a fund to discharge the debts owing from the said [A. B.], the said [*first vendor*] and [C. D.], his wife, [*second vendor*] and [E. F.], his wife, and [*third vendor*], have contracted with the said [*purchaser*] for the absolute sale of the inheritance in fee-simple in possession of the said premises, at and for the price or sum of £—— (*c*). And

Recital of will.

That late owner and his wife are dead, and that premises vested in co-heirs.

Contract for sale.

—for the con-

(*b*) In this case the will is recited, in order to shew the charge for payment of debts; otherwise, it would have been sufficient to state that the late owner had died intestate as to the said hereditaments, a devise in fee-simple thereof contained in his will having lapsed by the death of the devisee in his lifetime.

(*c*) It is not essential to state, that the object of the sale was to pay the debts. It is enough that the contrary does not appear, and then it will be presumed that the sale was made for this purpose. Whether the statement be made or not, the purchaser is not obliged to see to the application of his money. (*Vide ante*, Vol. 5, p. 373).

BY THREE OF FOUR CO-HEIRS, THE OTHER BEING AN INFANT.

inasmuch as the sale of the undivided fourth part vested in the said [*infant*] of and in the said premises cannot be now perfected by reason of his infancy, the said [*first vendor*], [*second vendor*], and [*third vendor*], have undertaken that the said [*infant*], within the space of one calendar month next after that he shall have attained his age of twenty-one years, or his heir in case of his death in the meantime, within one calendar month next after such decease (*d*), shall and will convey and assure the same to such and the same uses as are hereinafter expressed (*e*).

Covenant by the vendors for conveyance by the infant of the other undivided fourth share.

Testatum.

NOW THIS INDENTURE WITNESSETH, that, in consideration of the sum of £——, of lawful money of Great Britain and Ireland, paid by the said [*purchaser*] to the said [*first vendor*] and [C. D.], his wife, [*second vendor*] and [E. F.], his wife, and [*third vendor*], at and before the execution of these presents, the receipt of which said sum of £—— (*f*), being the full consideration for the absolute purchase of the inheritance in fee-simple of the entirety of the said several premises so contracted to be sold as aforesaid, the said [*first vendor*] and [C. D.], his wife, [*second vendor*] and [E. F.], his wife, and [*third vendor*], do hereby acknowledge, and from the same respectively do acquit, release, and discharge the said [*purchaser*], his heirs, exe-

In consideration of purchase-money, grantors convey their respective shares.

(*d*) It seems proper to add, especially if the heir apparent or presumptive of the infant be a minor:—

Variation providing for the event of the heir being under disability.

"or, if such heir shall be under any disability, then within one calendar month after the removal of such disability."

(*e*) If any portion of the purchase-money is retained by the purchaser, add—

"and have agreed that in the meantime the sum of £——, part of the said purchase-money, shall be retained by the said [*purchaser*] at interest, after the rate of 5*l.* for 100*l.* by the year."

Also, where infant's share of purchase-money is retained by the purchaser.

(*f*) If part of the purchase-money is retained, add:—

"which, together with the said sum of £——, agreed to be retained by the said [*purchaser*] as aforesaid, make in the whole the said purchase-money or sum of £——."

BY THREE OF FOUR CO-HEIRS, THE OTHER BEING AN INFANT.

cutors, and administrators, the said [*first vendor*] and [C. D.], his wife, [*second vendor*] and [E. F.], his wife, and [*third vendor*], *Have*, and every of them *Hath* granted, bargained, sold, and released, and by these presents *Do*, and every of them *Doth* grant, bargain, sell, and release unto the said [*purchaser*], (in his actual possession now being, by virtue of a bargain and sale to him thereof made by the said [*first vendor*] and [C. D.], his wife, [*second vendor*] and [E. F.], his wife, and [*third vendor*], for a pecuniary consideration, by indenture bearing date the day next before the day of the date of these presents, for one year commencing from the day next before the day of the date of the said indenture, and by force of the statute made for transferring uses into possession), and to his heirs and assigns, ALL THOSE three undivided fourth parts or shares of the said [*first vendor*] and [C. D.], his wife, [*second vendor*] and [E. F.], his wife, and [*third vendor*], of and in ALL THAT *(describe parcels)*, And also of and in the reversion and reversions, remainder and remainders, rents and profits of all and singular the said premises, *And* all the estate, right, title, interest, use, trust, claim, and demand whatsoever, either at law or in equity, of them the said [*first vendor*] and [C. D.], his wife, [*second vendor*] and [E. F.], his wife, and [*third vendor*], respectively, in and to the said premises and every part thereof; And all deeds, evidences, and writings relating to the said premises, which they the said [*first vendor*] and [C. D.], his wife, [*second vendor*] and [E. F.], his wife, and [*third vendor*], or any of them, have or hath in their or any of their custody or power, TO HAVE AND TO HOLD the said three undivided fourth parts or shares of and in the said —— and hereditaments, and all other the premises mentioned to be hereby released, with their and every of their appurtenances, unto the said [*purchaser*] and his heirs, to the uses following, that is to say, *(uses to prevent dower*, ut ante, Vol. 7, p. 461). AND for further assurance the said [*first vendor*], for himself, his heirs, executors, and administrators, and the said [*second vendor*], for himself, his heirs, executors, and administrators, do hereby severally covenant with the said [*purchaser*], his heirs and assigns, That they the said [*first vendor*] and [C. D.], his

Reference to lease for a year.

Premises.

And all the estate, &c.

Habendum.

Uses.

Covenant by husbands of co-heirs to levy a fine.

BY THREE OF FOUR CO-HEIRS, THE OTHER BEING AN INFANT.

wife, (she hereby consenting), and the said [*second vendor*] and [E. F.], his wife, (she hereby consenting) (*g*), shall and will, at the costs of the said [*first vendor*] and [*second vendor*], respectively, before the end of —— term now next ensuing the date hereof, or of some other subsequent term, at the request of the said [*purchaser*], his heirs or assigns, acknowledge and levy in due form of law before the Justices of his Majesty's Court of Common Pleas at Westminster (*h*), one or more fine or fines *sur cognizance de droit come ceo, &c.*, with proclamations, unto the said [*purchaser*] and his heirs, of two undivided fourth parts or shares of the said —— and hereditaments and premises, by such apt and convenient names and other descriptions as will effectually comprise the same. AND it is hereby declared, that, as well the said fine so as aforesaid or in any other manner to be levied, as all other fines, conveyances, and assurances in the law whatsoever already acknowledged, levied, suffered, or executed, or hereafter to be acknowledged, levied, suffered, or executed, of the said two undivided fourth parts of the said —— and hereditaments, with the appurtenances, or any of them, or any part thereof, by or between the said parties to these presents, or

Declaration of uses of fine.

(*g*) It is not correct to extend the covenant to the *heirs* of the wife, as is commonly done, as such heir may not be under the disability of coverture, in which case a fine would not be necessary; and whether it were or not, the covenant for further assurance would extend to it.

(*h*) Where such fine is to be levied of tenements in ancient demesne, say—

Variations where fine is levied in courts of ancient demesne, or the city of Chester.

"shall and will, at the next or some other court-baron to be held within the manor of ——, acknowledge and levy one fine *sur &c.* upon a plea of covenant, according to the custom of the said manor, unto" &c.

N. B. No proclamations in this case.

If the fine is to be levied in Chester, say—

"at the next portmoot Court of our Lord the King of the said city of Chester, to be held at the same city in the common hall of pleas there, according to the custom of the same city, acknowledge and levy in due form of law before the mayor of the said city, unto" &c.

BY THREE OF FOUR CO-HEIRS, THE OTHER BEING AN INFANT.

any or either of them, shall be and enure To the uses hereinbefore declared concerning the hereditaments hereby released, or intended so to be. AND the said [*first vendor*], for himself, his heirs, executors, and administrators, and for the estate, title, possession, and further assurance of one undivided fourth part only of the said premises, and as to, for, and concerning the acts, deeds, and defaults of himself and the said [C. D.], his wife, and the said [A. B.], deceased, and all persons claiming through or under them respectively only; and the said [*second vendor*], for himself, his heirs, executors, and administrators, and for the estate, title, possession, and further assurance of one other undivided fourth part only of the said premises, and as to, for, and concerning the acts, deeds, and defaults of himself and the said [E. F.], his wife, and the said [A. B.], deceased, and all persons claiming through or under them respectively only; and the said [*third vendor*], for himself, his heirs, executors, and administrators, and for the estate, title, possession, and further assurance of one undivided fourth part only of the said premises, and as to, for, and concerning the acts, deeds, and defaults of himself, and the said [A. B.], deceased, and all persons claiming through or under them respectively only, Do severally covenant with the said [*purchaser*], his heirs and assigns, by these presents, in manner following, (that is to say), That, for and notwithstanding any act, matter, or thing whatsoever, by them the said [*first vendor*] and [C. D.], his wife, [*second vendor*] and [E. F.], his wife, and [*third vendor*], or any or either of them, or by the said [A. B.], deceased, heretofore made, executed, done, or suffered to the contrary, They the said [*first vendor*] and [C. D.], his wife, [*second vendor*] and [E. F.], his wife, and [*third vendor*], some or one of them, are or is now seised of three undivided fourth parts of the said —— and premises (*i*)

Covenants for title by vendors, according to the respective shares of themselves and their wives.

That the grantors are seised in fee.

Remarks upon the precedent in the text.

(*i*) A few alterations in this precedent have been made, which should be noticed. The covenants for title extended to the *entirety*, but, as the covenant for the future conveyance of the infant's share provides (as it will be seen) that he (the infant) shall enter into the usual covenants for title, it was deemed more proper to restrict the covenants in the text to the undivided shares of the present grantors and covenantors.

Sometimes, indeed, where an undivided share is outstanding in an in-

mentioned to be hereby released, for an absolute and indefeasible estate of inheritance in fee-simple in possession: And

BY THREE OF FOUR CO-HEIRS, THE OTHER BEING AN INFANT.

fant, whose conveyance the vendors bind themselves to obtain, it might be prudent, if the vendors have received the whole purchase-money, and they stand in the relation of heirs presumptive to the infant, to make their conveyance, as well as their covenants for title, extend to the entirety, in order that if the land should afterwards descend to them by the death of the infant, the shares so subsequently acquired may be bound by estoppel. It was formerly thought that estoppel was confined to assurances by record and demises and feoffments by indenture; but it is now clear that all the effect which belongs to a fine or demise may be derived from any other assurance, if made by indenture. Thus, in the case of *Bensley* v. *Burdon*, 2 Sim. & Stu. 519, where A., reciting that he was entitled to a remainder in fee expectant upon the determination of the life estate of his father, granted an annuity charged on such remainder, and also conveyed the remainder upon trust for sale; at the time of this transaction A. had no estate whatever in the lands in question, but he afterwards acquired an estate for life therein under the will of his father; A. subsequently conveyed the devised estates to trustees for certain purposes, against whom the assignees of the annuitant, who had become bankrupt, filed a bill praying a conveyance, for the purpose of charging A.'s life estate with the annuity. But, Sir *J. Leach*, V. C., dismissed the bill, on the ground, that the relief prayed was unnecessary, since the first conveyance operated at law by estoppel. His Honour observed, that, where by deed indented a man represents himself as the owner of an estate, and affects to convey it for valuable consideration, having at the time no possession or interest in the estate, and where nothing, therefore, can pass, whatever be the nature of the conveyance, there, if by any means he afterwards acquire an interest in the estate, he is estopped, in respect of the solemnity of the instrument, from saying, as against the other party to the indenture, contrary to his averment in that indenture, that he had not such interest at the time of its execution. Is not an indenture of release as solemn an instrument as any other indenture? Of what importance to this principle can it be, whether the indenture which operates this effect by its mere character as a solemn instrument, is an indenture of release or an indenture of feoffment?

Estoppel extends to all assurances by indenture.

It is to be remembered, however, that, according to the doctrine of the case of *Hermitage* v. *Tomkins*, 1 Lord Raym. 729, it is essential to the operation of an indenture by estoppel, that it should not appear upon the face of the indenture, that the grantor had no interest, and, therefore, it would be advisable not to introduce into the deed of conveyance any recital explanatory of the state of the title; and this distinction, growing

Whether an indenture can operate by estoppel, when it discloses that the grantor had no interest.

BY THREE OF FOUR CO-HEIRS, THE OTHER BEING AN INFANT.

also that they the said [*first vendor*] and [C. D.], his wife, [*second vendor*] and [E. F.], his wife, and [*third vendor*], some or one of them, for or notwithstanding any such act, matter, or thing as aforesaid, now have or hath in himself, herself, or themselves, good right, full power, and lawful

Have a right to convey.

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out of the application of the doctrine of estoppel, is quite consistent with the principle on which that doctrine rests, and which may be described to be, that where a man makes a solemn assurance of an estate, involving, of course, unless contradicted by the context, an assertion of title to such estate, the law will not allow him, or any person claiming under him, to aver, in contravention of his own grant, that the land, which was the subject of the conveyance, did not then belong to him. The ground for this evidently is, the inconsistency between the grant of the party and his subsequent allegation, that he had no title at the time; but which inconsistency seems not to exist, if the indenture itself discloses that the grantor had no estate, for the recital may be considered as controlling the granting part of the instrument. But, perhaps, the late case of *Doe* d. *Christmas* v. *Oliver*, 10 Barn. & Cress. 181, may be thought to throw a doubt upon this doctrine, since no attempt was made to negative the operation of a fine as an estoppel, on the ground of the want of title of the conusor being apparent on the face of the deed declaring the uses, as it is evident was the fact, since the conusor was described in the statement of parties to the deed as devisee named in the will under which he claimed; and a deed and fine being considered as one assurance, there seems to be no solid distinction between this case and that under discussion; but, as the point was not brought to the attention of the Court, it is not safe to disregard the doctrine of *Hermitage* v. *Tomkins*, either as applicable to fines or indentures. (*Vide* some observations, *ante*, Vol. 4, p. 160, 2nd edit.) It may be observed, in regard to fines levied by a contingent remainder-man, that it has been lately decided, not only that the fine does not destroy the contingent remainder, *Doe* d. *Brune* v. *Martyn*, 8 B. & C. 497, *S. C.* 2 M. & R. 485, and has an incipient operation by estoppel, but that, when the contingency happens, it operates upon the estate *precisely in the same manner as though that estate had been vested in the conusor at the time the fine was levied;* and, it seems, according to the case of *Bensley* v. *Burdon*, 2 Sim. & Stu. 519, that the same effect would flow from a conveyance by indentures of lease and release. This goes far to overturn the position strenuously maintained by some writers, t at a contingent remainder is not capable of being the subject of alienation, or at least substitutes for that position the much narrower doctrine, that such an interest is not alienable, except by assurance by record or *by indenture.*

Operation of a fine by a contingent remainder-man.

and absolute authority, by these presents and the said fine to be levied as aforesaid, to bargain, sell, release, and assure the said three undivided fourth parts, mentioned to be hereby released as aforesaid, of the said —— and premises, with their appurtenances, unto the said [*purchaser*], his heirs and assigns, to the several uses, and in the manner aforesaid, according to the true intent and meaning of these presents; *And further*, that all and singular the said three undivided fourth parts of and in the said —— and premises mentioned to be hereby released as aforesaid, with their and every of their appurtenances, shall and lawfully may, from time to time and at all times for ever hereafter, remain, continue, and be to the several uses hereinbefore expressed concerning the same, and shall and may accordingly be peaceably and quietly held and enjoyed, without the interruption or denial of them the said [*first vendor*] and [C. D.], his wife, [*second vendor*] and [E. F.], his wife, and [*third vendor*], or of the heirs of the said [C. D.], [E.F.], and [*third vendor*] respectively, or of any other person or persons lawfully claiming any estate, right, title, trust, or interest, of, in, or to the same, by, from, or under them or any of them, or by, from, or under the said [A. B.], deceased, or by means of their or any or either of their acts, default, privity, consent, and procurement; And that free and clear, and freely and clearly acquitted, exonerated, and discharged of and from all and all manner of former and other estates, rights, titles, charges, and incumbrances whatsoever, made, done, occasioned, or suffered by them the said [*first vendor*] and [C. D.], his wife, [*second vendor*] and [E. F.], his wife, and [*third vendor*], or any or either of them, or by the said [A. B.], deceased, or by or through their or any or either of their acts, defaults, privity, consent, or procurement; *And moreover*, that they the said [*first vendor*] and [C. D.], his wife, [*second vendor*] and [E. F.], his wife, and [*third vendor*], and the heirs of the said [C. D.], [E. F.], and [*third vendor*] respectively, and all and every other person or persons lawfully claiming any estate, right, title, trust, or interest, of, in, to, or out of the said three undivided fourth parts or shares mentioned to be hereby released, of and in the said —— and premises as aforesaid, by, from, or under them or any of them, or by, from, or under the said [A. B.], deceased, shall and will, from time to time and at all times

BY THREE OF FOUR CO-HEIRS, THE OTHER BEING AN INFANT.

For peaceable possession,

—free from incumbrances.

For further assurance.

BY THREE OF FOUR CO-HEIRS, THE OTHER BEING AN INFANT.

hereafter, at the reasonable request, and at the costs and charges of the said [*purchaser*], his appointees, heirs or assigns, make, do, acknowledge, levy, suffer, and execute, or cause to be made, done, acknowledged, levied, suffered, and executed, every such further act, deed, conveyance, and assurance whatsoever, for the more effectually conveying and assuring the said three undivided fourth parts or shares mentioned to be hereby released of and in the said —— and premises as aforesaid, with their and every of their appurtenances, unto the said [*purchaser*], his appointees, heirs, and assigns, to the several uses hereinbefore expressed concerning the same, be the same by fine or fines, common recovery or common recoveries, or any other matter of record, or otherwise howsoever, as by the said [*purchaser*], his appointees, heirs, or assigns, or his or their counsel learned in the law, shall be reasonably advised and required, so as such further assurances contain in them no further or other covenants or warranty than against the person or persons who shall be required to make and execute the same, and against his and their own heirs, acts and deeds respectively, and so as no person be compelled or compellable to travel or go from the usual place of his or her respective abode for the doing thereof.

Covenant that the infant shall convey when of age.

And lastly, the said [*first vendor*], [*second vendor*], and [*third vendor*], for themselves and their respective heirs, executors, and administrators, do hereby jointly and severally covenant with the said [*purchaser*], his heirs and assigns, That the said [*infant*], within one calendar month next after that he shall have attained his age of twenty-one years, or, in case of his death in the meantime, then the heir of the said [*infant*], within one calendar month next after such his decease (*k*), and also any person or persons claiming through or under the said [*infant*] or [*heir*] (*l*), shall and will, at the request, costs, and charges of him the said [*purchaser*], his appointees, heirs, or assigns, by such conveyances and assurances in the law as the said [*purchas-*

(*k*) "or if such heir shall be under any disability, within one calendar month next after the removal of such disability." *Vide ante*, p. 51.

(*l*) This would extend to any wife of the infant or heir, who might be dowable.

BY THREE OF FOUR CO-HEIRS, THE OTHER BEING AN INFANT.

er], his appointees, heirs, or assigns, or his or their counsel learned in the law shall advise and require, but if any fine shall have become necessary by reason of the marriage of the said [*infant*], or otherwise, then, as to such fine, at the costs of the said [*infant*], or other the person or persons levying the same, effectually convey and assure All that one undivided fourth part or share now vested in him the said [*infant*], of and in all and singular the said —— and premises, with the appurtenances, unto the said [*purchaser*], his heirs and assigns, To the several uses hereinbefore limited or expressed, or such of them as shall be then subsisting and capable of taking effect, free from all incumbrances whatsoever, made, done, committed, or suffered by him the said [*infant*], or any person or persons claiming through or under him, And enter into such covenants for the title thereof as in the like cases are usual; And that in the meantime it shall be lawful for the person or persons for the time being entitled under the uses hereinbefore declared and contained, peaceably and quietly to hold and enjoy the said undivided fourth part or share of the said —— and premises, without any interruption or disturbance of or by the said [*infant*], or any person or persons lawfully claiming through or under him (*m*). IN WITNESS (*n*), &c.

(*m*) If any part of the purchase-money is retained by the purchaser, add:—

Covenant by purchaser to pay infant his share of purchase-money on his conveying.

"*And* the said [*purchaser*], for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said [*first vendor*], [*second vendor*], and [*third vendor*], and every of them, their respective executors and administrators, that he the said [*purchaser*], his heirs, executors, or administrators, shall and will, on the perfecting such conveyances as are last mentioned, pay or cause to be paid unto the said [*infant*], or his heirs, the sum of £——, agreed and intended to be retained by him the said [*purchaser*], out of the said entire purchase-money or sum of £——, together with interest for the same after the rate aforesaid, in full satisfaction and discharge of his said purchase-money."

(*n*) If the deed is executed by any one of the parties by attorney, add to the *testimonium* as follows:—

"As to the said [A. B.], by [C. D.] his attorney lawfully

BY THREE OF FOUR CO-HEIRS, THE OTHER BEING AN INFANT.

authorized in that behalf by a certain power of attorney hereunto annexed, or hereupon indorsed.

(L. S.) [A. B.] by [C. D.], his attorney."

Delivery and attestation on execution by attorney.

The delivery should be—

"I deliver this as the act and deed of the above-named [A. B.]"

The attestation may be thus—

"Signed, sealed, and delivered by [C. D.], as the attorney, in the name, and as the act and deed, of the within-named [A. B.], in the presence of

[*Witnesses.*]

OF COPYHOLDS UNDER A POWER IN A WILL.

BARGAIN *and* SALE *of* COPYHOLD LAND *by the* TESTAMENTARY DONEES *of a* POWER (*a*), *the Persons interested in the Purchase-Money covenanting for the Title.*

Parties.

THIS INDENTURE, made the —— day of ——, in the year of the Christian era, ——, BETWEEN [*vendors*], of

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As to the best mode of a testator's creating a power or trust for the sale of copyholds.

(*a*) Where it is intended that copyhold estates shall be sold by trustees immediately on the testator's decease, it is advisable not to devise the property to them, but merely to create an authority to sell, in order to avoid the necessity and the consequent expense of the trustees being admitted; as donees of the power of sale of course they are not entitled, nor can they be compelled to be admitted; they have only a power of nominating on a sale the persons who are entitled to claim admittance from the lord, and to whose benefit the surrender to the use of the will, when such surrender was necessary to its validity, enured. The same effect now arises from the will alone. But the expedient for avoiding the necessity of the admittance of the trustees can only be adopted when the sale is to take place immediately on the testator's decease; for the lord would be entitled to require that the vacancy in the tenancy occasioned by the death of the late copyholder, should be supplied by the admittance of the person to whom the property had devolved, and, in case of default, after proclamations in the usual manner, might seize *quousque*. The sale,

&c., of the first part; [*five cestuis que trust*], of &c., of the second part; and [*purchaser*], of &c., of the third part: WHEREAS the commissioners named in and appointed by an act of Parliament passed in the —— year of the reign of his late Majesty King George the Third, intituled "An Act for inclosing lands in the parishes of —— and ——, in the county of ——," did, by their award in writing under their hands and

OF COPYHOLDS UNDER A POWER IN A WILL.

Recital of the award of commissioners under an inclosure act.

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therefore, should be made in sufficient time to prevent this, otherwise the heir must be admitted in order to save the property from the lord's seizure. If the property is devised for life, and is to be sold on the determination of that estate, of course it is impossible to prevent the necessity of the devisee for life being admitted; but even then it may be worth while to give the trustees a power of sale only instead of an estate, if the fine on admittance is considerable, in order to avoid the fine in regard to the remainder in fee.

As to the lord's right to seize in default of the heir coming in to be admitted.

The following points have lately been decided as to the proceedings of the lord of a manor, on the default of the heir of his tenant coming in to be admitted: *first*, that the lord may avail himself of the right to seize, which had accrued to the preceding lord, under whose will he claimed. *Secondly*, that there must be three proclamations, on the death of a copyholder, for the heir to come in to be admitted, before the lord can seize; which proclamations should be made at three *consecutive* courts, there being no distinction in this respect between a seizure for a forfeiture, and a seizure *quousque;* and therefore, there having been a lapse of several courts between the second and third proclamations, the precept and seizure thereon could not be supported. *Doe* d. *Bover* v. *Freeman*, 1 Barn. & Ad. 736.

As to sales of freeholds under a common law authority.

The precedent in the text is also adapted to the case of freeholds being sold under a common law authority in a will, though such authorities are, at the present day, not often created of freehold lands, as the reasons which recommend their adoption in regard to copyholds do not apply to freeholds. The conveyancer, in preparing a bargain and sale by the donees of such a power, will bear in mind the difference between the effect of such an instrument, and a bargain and sale which derives it effect from the statute of uses. The common law bargain and sale raises a seisin, on which uses may be limited, and, therefore, the property may be conveyed to the ordinary limitations to prevent dower, including the power of appointment, which it is well known a statutory bargain and sale does not admit of, as the instrument does not raise a seisin, but only transfers a use. It is also to be observed, that a bargain and sale under a common law authority does not require enrolment.

OF COPYHOLDS UNDER A POWER IN A WILL.

seals, dated the —— day of ——, ——, assign and allot unto [*testator*], of &c., (with other lands), (*Describe parcels, consisting of one acre and three roods of land*); And the said commissioners did by their said award, in pursuance of a power in that behalf contained in the hereinbefore mentioned act, determine that the allotment made to the said [*testator*] should be copyhold of the manor of ——, in the aforesaid county of ——, the same being allotted in lieu and in respect of two acres of land with a messuage thereon, which he then held by copy of court roll of the said manor, and of the rights of common appendant or appurtenant thereto; And whereas the said [*testator*], on the —— day of ——, in the year ——, he being then seised of the said two acres of land for an estate of inheritance to him and his heirs, according to the custom of the said manor, surrendered the same to the use of his last will and testament in writing (*b*); And whereas, at a court holden for the said manor, on the —— day of ——, in the year ——, the said [*testator*] was admitted, by virtue of the said award, to the said one acre and three roods of land, allotted to him as aforesaid; *To hold* the same for such estate and interest as he before the execution of the said award had in the said two acres of land with the said messuage thereon, in respect of which the said allotment was made; And whereas the said [*testator*], by a testamentary paper under his hand, dated the —— day of ——, appointed the above-named [*vendors*] executors and trustees thereof, and thereby desired and authorized them to sell and dispose of all his copyhold messuages, lands, and hereditaments whatsoever, either altogether or in parcels, and to give receipts for the purchase money; and declared that such purchase money should form part of his personal estate; and after disposing of part of his household furniture, linen, and plate, and providing, out of his personal estate, an annuity for his wife, who is since deceased, he disposed of the money arising from the sale of his copyhold estate, and the rents thereof until sold, and the residue of his personal estate, after payment of his just debts and

Recital of testator's surrender to the use of his will.

—Testator's admission to inclosure allotment.

Recital of will creating power of sale.

(*b*) Not now necessary to be *done*, but still proper to be *recited*, if the testator died before the passing of the stat. 55 Geo. 3, c. 192.

funeral expenses, unto and equally between his children, the above-named [*five cestuis que trust*]; AND WHEREAS the said [*testator*], the father, died shortly after the date of the aforesaid testamentary writing, without having revoked or altered the same; and the said [*vendors*], in the month of —— following, proved the said testamentary paper in the Prerogative Court of the Archbishop of Canterbury; AND WHEREAS the said [*testator*], the father, continued seised as aforesaid of the said one acre and three roods of land from the time of his admission thereto until his decease, and it was provided by the hereinbefore mentioned act of Parliament, that the lands which should be allotted by virtue thereof should be subject to the same wills as the messuages and lands in respect of which such allotments should be made would have been subject to or affected by in case the said act of Parliament had not been made (*c*). AND WHEREAS the said [*vendors*] have contracted with the said [*purchaser*] for the sale to him of the said one acre and three roods of land allotted to the said [*testator*], deceased, as aforesaid, at the price of £——. NOW THIS INDENTURE WITNESSETH, that, in consideration of the sum of £——, of lawful money of Great Britain and Ireland, paid by the said [*purchaser*] to the said [*vendors*], at or before the sealing and delivery of these presents, by the direction of the other parties hereto, the receipt of which said sum they the said [*vendors*] do hereby acknowledge, and thereof and therefrom do hereby acquit and discharge the said [*purchaser*], his heirs, executors, and administrators, they the said [*vendors*], in pursuance of the direction and authority contained in the hereinbefore recited will of the said [*testator*] respecting the sale of his copyhold hereditaments, and with the approbation and by the direction of the parties hereto of the second part, *Have* bargained and sold, and by these presents *Do* bargain and sell unto the said [*purchaser*], his heirs and assigns, ALL THAT piece or parcel of land containing one acre and three roods, situate in the parish of ——,

OF COPYHOLDS UNDER A POWER IN A WILL.

Death of testator.

Contract for sale.

Testatum.

In consideration of purchase-money, vendors, in pursuance of the testamentary direction, bargain and sell to the purchaser.

Parcels.

(*c*) This recital is only applicable when the inclosure takes place in the interval between the making of the will and the testator's death, unless the testator died before the passing of the statute 55 Geo. 3, c. 192, in which case it would also apply where the inclosure intervened between the surrender to the use of the will and the testator's death.

OF COPYHOLDS UNDER A POWER IN A WILL.

in the county of ——, so as aforesaid allotted and awarded to the said [*testator*] by the said commissioners for executing the hereinbefore recited inclosure act, with the appurtenances; and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; To HAVE AND TO HOLD the said piece or parcel of land and premises hereby bargained and sold, or intended so to be, with their appurtenances, unto the said [*purchaser*], his heirs and assigns for ever, To THE USE of him the said [*purchaser*], his heirs and assigns for ever, at the will of the lord or lady and according to the custom of the aforesaid manor; AND the said [*four of the five cestuis que trust*], each one of them for himself and herself, and his and her heirs, executors, and administrators, acts and deeds only, and so far as respects one undivided fifth part or share in the said hereditaments hereby bargained and sold, or intended so to be, severally covenant, and the said [*husband of the other cestui que trust*], for himself, his heirs, executors, and administrators, acts and deeds, and for the acts and deeds of the said [*wife*], his wife, so far as respects the remaining one undivided fifth part or share of the said hereditaments, doth hereby covenant with the said [*purchaser*], his heirs and assigns, in manner following, that is to say, That, notwithstanding any act, deed, or thing by the said parties hereto of the second part, or any of them, or by the said [*testator*], the testator, deceased, made, done, committed, or knowingly suffered to the contrary, they the said parties hereto of the first part now have in themselves good right, full power, and lawful and absolute authority to bargain and sell the said hereditaments and premises hereby bargained and sold, or intended so to be, to the use of the said [*purchaser*], his heirs and assigns, in manner aforesaid, according to the true intent and meaning of these presents; *And also*, that it shall be lawful for the said [*purchaser*], his heirs and assigns, at all times hereafter peaceably and quietly to have, hold, and enjoy the said hereditaments and premises hereby bargained and sold, or intended so to be, and the rents, issues, and profits thereof to receive and take to his and their own use, without any lawful hindrance or interruption, of, from, or by the said parties hereto of the second part, or any of them, or the heirs, executors, administrators, or assigns of any of them, or of, from, or by any other person or persons

Habendum to the use of purchaser in fee.

Covenant by *cestuis que trust*.

That the vendors have power to convey.

For quiet enjoyment.

claiming by, from, or under the said [*testator*], the testator, deceased; *And that* free and clear of and from all former and other charges and incumbrances whatsoever, had, made, executed, occasioned, or suffered by the said parties hereto of the second part, or any of them, or by the said [*testator*], the testator, deceased, by or through their, or any or either of their acts, default, privity, consent, or procurement; *And lastly*, that they the said parties hereto of the second part, and their respective heirs, and all other persons lawfully claiming any estate, right, or interest in or to the said hereditaments and premises hereby bargained and sold, or intended so to be, by, from, through, under, or in trust for them the said parties hereto of the second part, or any of them, or by, from, through, under, or in trust for the said [*testator*], the testator, deceased, shall and will at any time and from time to time hereafter, upon the request and at the costs and charges of the said [*purchaser*], his heirs or assigns, make, do, and execute, or cause and procure to be made, done, and executed, all such further and other lawful and reasonable acts, deeds, conveyances, and assurances, for the more perfectly and absolutely conveying and assuring of the same hereditaments and premises, with their appurtenances, to the use of the said [*purchaser*], his heirs and assigns, as by him or them, or his or their counsel in the law, shall be devised or advised and required. IN WITNESS, &c.

Free from incumbrances.

For further assurance.

TO DEVISEES OF DECEASED PURCHASER.

APPOINTMENT *and* RELEASE *by two Vendors, of their respective Moieties, to the* DEVISEES *of the deceased* PURCHASER, *the Consideration Money having been paid in the Purchaser's Lifetime* (*a*), *and part of the purchased Estate conveyed to a Sub-purchaser in the Purchaser's Lifetime.*

Parties.

THIS INDENTURE, made the —— day of ——, in the —— year of our Lord, ——, BETWEEN [*vendors*], of &c., of the first part; [*purchaser's widow*], of &c., of the second part; [*purchaser's daughter*], of &c., of the third part; [*purchaser's son*], of &c., of the fourth part; and [*dower trustee*], of &c., of the fifth part.

Recital of conveyance to vendors.

WHEREAS, by indentures of lease and release, bearing date respectively on or about the —— and —— days of ——, the release being expressed to be made between [*commissioners*], of &c., commissioners named and appointed in and by a certain act of Parliament made and passed in the forty-ninth year of the reign

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Duty of an executor in regard to estates purchased by his testator.

(*a*) It is incumbent on an executor or administrator, before he pays for an estate which was purchased by his deceased testator or intestate, to ascertain that the title is such as a Court of equity would have compelled the purchaser to accept; for, unless this is the case, his payment of the purchase-money out of the testator's or intestate's personal estate would be a misapplication of the assets. If the purchaser in his lifetime did any act which amounted to an acceptance of the title, this would preclude all inquiry into its sufficiency as between his representatives; but as the payment of the purchase-money is not necessarily such an act, the executor would not be relieved from the necessity of satisfying himself of the validity of the title, by the fact that he was not called upon to pay for the estate, the purchase-money having been paid in the testator's lifetime; since, if the title were bad, it would be his duty to insist upon the contract being rescinded, and the purchase-money returned: the money so returned would go in augmentation of the personal estate.

TO DEVISEES OF DECEASED PURCHASER.

of his late Majesty King George the Third, intituled "An Act for inclosing lands in the parish of ——, in the county of ——," of the first part; [A. B.], gentleman, of the second part; and the said [*vendors*], of the third part; *All that* piece or parcel of land, (being part of an inclosure called ——), containing, by survey, eighteen acres, in the parish of —— aforesaid, and bounded *(describe boundaries)*, was conveyed and assured unto the said [A. B.] and his heirs; As to one moiety thereof, *To the use* of such person and persons, for such estate and estates, and for such intents and purposes as the said [*first vendor*] from time to time, or at any time, by any deed or deeds, writing or writings, to be by him sealed and delivered in the presence of, and to be attested by two or more credible witnesses, should direct, limit, or appoint; and in default of and subject to such direction, limitation, or appointment, *To the use* of the said [*vendor*] and his assigns, for his life, with a limitation to the use of the said [*second vendor*], his executors and administrators, during the life of the said [*first vendor*], *In trust* for him and his assigns, with remainder to the use of the said [*first vendor*], his heirs and assigns, for ever; *And as to and concerning* the remaining moiety or undivided half part thereof, *To the use* of such person and persons, and for such estate and estates, and for such intents and purposes as the said [*second vendor*] from time to time, or at any time, by any deed or deeds, writing or writings, to be by him sealed and delivered in the presence of and to be attested by two or more credible witnesses, should direct, limit, or appoint; *And* in default of and subject to such direction, limitation, or appointment, *To the use* of the said [*second vendor*], and his assigns, for his life; with a limitation *To the use* of the said [*first vendor*], his executors and administrators, during the life of the said [*second vendor*], *In trust* for him and his assigns; with remainder to the use of the said [*second vendor*], his heirs and assigns, for ever; AND WHEREAS the said [*vendors*] did, on or about the —— day of ——, in the year ——, contract and agree with [*testator*], of &c., aforesaid, for the absolute sale to him of the inheritance in fee-simple of the piece or parcel of land and hereditaments hereinbefore mentioned and comprised in the said indentures of lease and release hereinbe-

—Contract for sale.

TO DEVISEES OF DECEASED PURCHASER.

fore recited, at or for the price or sum of 1,000*l.*; *And* the said [*testator*], shortly after the said contract was so entered into as aforesaid, paid the said purchase-money or sum of 1,000*l.* to the said [*vendors*], as they do hereby respectively acknowledge, testified by their respectively executing these presents, but no conveyance or other assurance of the said land and hereditaments, or any part thereof, was made to the said [*testator*] in pursuance of the said recited contract;

—Payment of purchase-money.

—Conveyance of part to a sub-purchaser.

And whereas, by indentures of lease and release, bearing date on or about the —— and —— days of ——, ——, the release being of four parts, and made between the said [*vendors*], of the first part; the said [*testator*], of the second part; [C. D.], of &c., of the third part; and [E. F.], of &c., of the fourth part; *All that* piece or parcel of freehold land lying and being in —— aforesaid, containing by admeasurement eight acres, three roods, twenty-four perches, (more or less), being part and parcel of the aforesaid eighteen acres of land, and of the inclosure called the ——, in —— aforesaid, conveyed and assured unto the said [*vendors*] by the hereinbefore recited indentures of lease and release as aforesaid, and which said eight acres, three roods, and twenty-four perches, were bounded *(describe boundaries)*, was, at the request and by the direction of the said [*testator*], and for a pecuniary consideration paid to him by the said [C. D.], duly appointed, conveyed, and assured by the said [*vendors*] unto or to uses for the benefit of the said [C. D.],

Recital of purchaser's will.

his heirs, appointees, and assigns; And whereas the said [*testator*] did, in such manner as the law requires for the validity of devises of real estates, duly sign and publish his last will and testament in writing, bearing date on or about the —— day of ——, and did thereby give, devise, and bequeath all and singular his real estates, both freehold and copyhold, and all his personal estate and effects not thereinbefore specifically disposed of, and which he or any person or persons in trust for him or for his use or benefit, was or were, or should or might, at the time of his decease, be seised or possessed of, interested in, or entitled unto, to his wife, the said [*widow*], and his son, the said [*son*], their heirs, executors, administrators, and assigns respectively, *Upon trust* to pay unto or permit his said wife [*widow*], and her assigns, for and during the term of her natural

life (*b*), to receive and take the rents and issues, dividends, interest, and annual produce thereof respectively; and after her decease, Then, *as to and concerning* one undivided moiety of his said real and personal estate and effects, *Upon trust* for his daughter, the said [*daughter*], then the wife of [*husband*], her heirs, executors, administrators, and assigns, absolutely; and in the event of her death in his, the said testator's, lifetime, Then upon other trusts in his said will mentioned; *And as to and concerning* the other or remaining undivided moiety or equal half part of his said real and personal estate and effects, *In trust* for his son, the said [*son*], his heirs, executors, administrators, and assigns, when and as he should attain the age of twenty-one years, and in case he should die under the age of twenty-one years, then upon other trusts in the said will mentioned; And the said [*testator*] appointed the said [*widow*] and [*son*] executrix and executor of his said will; AND WHEREAS the said [*testator*] departed this life in or about the month of ——, in the year ——, without having altered or revoked his said will, leaving the said [*widow*], his wife, and the said [*daughter*], then the wife of the said [*husband*], and the said [*son*], his children, him surviving; and the said will was afterwards duly proved by the said executrix and executor in the Prerogative Court of the Archbishop of Canterbury; AND WHEREAS the said [*daughter's husband*] died in or about the month of —— in the year ——, and the said [*son*] attained the age of twenty-one years on or about the —— day of ——; AND WHEREAS the said [*widow*] and [*daughter*], and [*son*], have respectively now applied to and requested the said [*vendors*] to appoint, convey, and assure such part of the land and hereditaments so purchased by the said [*testator*] as aforesaid as was not sold by him in his lifetime, and conveyed to the said [C. D.] by the said indentures of lease and release of the —— and —— days of ——, to the uses and in manner hereinafter mentioned, which they respectively have agreed to do. NOW THIS INDENTURE WITNESSETH, that in pursuance and execution of the said agreement, and in consideration of the

TO DEVISEES OF DECEASED PURCHASER.

Death of testator.

Death of daughter's husband.

Application of devisees for conveyance.

Testatum.

(*b*) This would vest the legal estate, and not merely the beneficial interest, in the widow.

TO DEVISEES OF DECEASED PURCHASER.

In consideration of purchase-money paid in purchaser's life-time, the vendors respectively appoint;

said sum of 1000*l.* of lawful money of Great Britain and Ireland paid to the said [*vendors*] by the said [*testator*] in his lifetime, as is hereinbefore mentioned, the receipt of which said sum of 1000*l.* they the said [*vendors*] do hereby respectively acknowledge, *Each* of them, the said [*vendors*], pursuant to and by virtue and in exercise of the power and authority to him given or reserved by the said hereinbefore recited indenture of release of the —— day of ——, ——, and of every other power and authority in anywise enabling him in this behalf, Doth, by this deed, sealed and delivered by him in the presence of, and to be attested by, the two credible persons, whose names are intended to be hereupon indorsed as witnesses attesting his respective execution of these presents, absolutely and irrevocably direct, limit, and appoint, That the one undivided moiety or equal half part, by the said last-mentioned indenture of release limited and assured to uses for his benefit, of and in the piece or parcel of land and hereditaments hereinafter described and hereby released, or intended so to be, with the appurtenances, shall, from henceforth, remain, continue, and be to the uses and upon and for the trusts, intents, and purposes hereinafter expressed and declared concerning the same.

To the uses after mentioned.

Further *testatum.*

Release by vendors.

AND THIS INDENTURE ALSO WITNESSETH, that, in consideration of the premises, and also in consideration of the sum of 10*s.* of lawful money aforesaid, to each of them the said [*vendors*] paid by the said [*releasee to uses*], immediately before the execution of these presents, the receipts whereof are hereby acknowledged, they the said [*vendors*], according to their several and respective estates and interests in the premises, but not further or otherwise, *have*, and each of them *hath* granted, bargained, sold, released, and confirmed, and by these presents *do*, and each of them *doth*, grant &c., unto the said [*releasee to uses*], his heirs and assigns, for ever, (in the actual possession of the said [*releasee to uses*] now being, by virtue of a bargain and sale thereof made to him by the said [*vendors*], in consideration of 5*s.*, by indenture bearing date on the day next before the day of the date of these presents, for one year, to be computed from the day next before the day of the date of the same indenture of bargain and sale, and by force of the statute made for transferring uses into possession),

Parcels.

ALL THAT piece or parcel of land, containing, by survey,

nine acres, sixteen perches, being the remaining part of the said piece of land containing eighteen acres, conveyed by the said commissioners to the said [*vendors*], as hereinbefore mentioned, and lying on the west side of the said piece of land, containing eight acres, three roods, twenty-four perches, conveyed to the said [C. D.] as aforesaid, as the same is now in the occupation of [*tenant*], or his undertenants; *And* all outhouses, edifices, buildings, feedings, timber and other trees, hedges, ditches, fences, mounds, ways, paths, waters, watercourses, liberties, privileges, easements, profits, commodities, advantages, and emoluments whatsoever to the said piece or parcel of land and hereditaments respectively belonging, or in anywise appertaining, or reputed to belong or appertain, or held, occupied, or enjoyed with or as parcel or member of the same, or any of them respectively; *And* (*c*) the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of the said piece or parcel of land and hereditaments, with their and every of their rights, members, and appurtenances; *And* all the estate, right, title, interest, use, trust, inheritance, property, possession, benefit, claim, and demand whatsoever, at law and in equity, or otherwise howsoever, of the said [*vendors*], respectively, of, in, to, from, or out of the same piece or parcel of land and hereditaments, intended to be hereby conveyed, and every part and parcel of the same, with their and every of their rights, members, and appurtenances: To HAVE AND TO HOLD the said piece or parcel of land, and all and singular other the premises hereby released, or intended so to be, and every part and parcel of the same, with their appurtenances, unto the said [*releasee to uses*], his heirs and assigns, To the uses, and upon and for the trusts, intents, and purposes hereinafter limited, expressed, and declared of and concerning the same; *And* it is hereby declared and agreed, by and between the said parties to these presents, That the directions, limitations,

TO DEVISEES OF DECEASED PURCHASER.

General words.

Habendum.

Declaration of uses.

(*c*) Many practitioners invariably omit the reversion-clause; and its insertion, if the lands are not in the occupation of a tenant, is rather incorrect; for unless there is a particular estate, there can be no reversion or remainder; and even where there is a subsisting tenancy, the clause is unnecessary, and may be properly dispensed with.

As to the reversion-clause.

TO DEVISEES OF DECEASED PURCHASER.

and appointments, and also the release hereinbefore contained, shall severally operate and enure To THE USE of the said [*widow*] and her assigns, for and during the term of her natural life; *And* from and immediately after her decease, then *As to and concerning* one undivided moiety, or equal half part, (the whole into two equal half parts being considered as divided), of and in the piece or parcel of land and hereditaments, with the appurtenances, To THE USE of the said [*daughter,*], her heirs and assigns, for ever. AND AS TO, FOR, AND CONCERNING the other or remaining undivided moiety or equal half part of the said piece or parcel of land and hereditaments, with the appurtenances, To THE USE of such person or persons, for such estate or estates, interest or interests, upon such trusts, and for such ends, intents, and purposes, and with, under, and subject to such powers, provisoes, limitations, declarations, and agreements, as the said [*son*] at any time or times, and from time to time, by any deed or deeds shall direct, limit, or appoint; *And* in default of such direction, limitation, or appointment, and in the meantime, and from time to time, until the same shall take effect, and from time to time subject to such uses, estates, trusts, charges, and interests as shall have been directed, limited, or appointed by the said [*son*], To THE USE of the said [*son*] and his assigns, for and during the term of his natural life; *And* from and after the determination of that estate by any means, To THE USE of the said [*dower trustee*], his heirs and assigns, during the natural life of the said [*son*], *Upon trust* for him and his assigns; And from and after the determination of the estate hereby limited in use to the said [*dower trustee*], his heirs and assigns, for the life of the said [*son*], Then TO THE USE of the said [*son*], his heirs and assigns, for ever; and to, for, and upon no other use, trust, intent, or purpose whatsoever; *And* each of them the said [*vendors*], so far as respects his one undivided moiety or equal half part of the said premises, and the acts and deeds relating thereto, and not further or otherwise, doth hereby separately for himself, and for his heirs, executors, and administrators, covenant and agree with the said [*releasee to uses*], his heirs, and assigns, in manner following, *viz.*, that notwithstanding any act, deed, matter, or thing whatsoever, made, done, committed, or suffered to the contrary by them the

Covenants by vendors, each as to his share.

TO DEVISEES OF DECEASED PURCHASER.

said [*vendors*], or either of them, they, or one of them, have or hath good right, full power, and lawful and absolute authority by these presents to appoint, release, and assure the said piece or parcel of land and hereditaments hereby appointed and released, or intended so to be, and every part and parcel of the same, with the appurtenances, to the uses and in manner aforesaid, according to the true intent and meaning of these presents; *And also*, that the said piece or parcel of land and hereditaments, and every part thereof, with their appurtenances, shall or lawfully may from time to time, and at all times for ever hereafter, remain, continue, and be to the uses and upon and for the trusts, intents, and purposes hereinbefore limited, expressed, and declared of or concerning the same, and be peaceably and quietly held and enjoyed, and the rents and profits thereof, and of every part thereof, be received and taken accordingly, without any interruption or denial whatsoever, of, from, or by them the said [*vendors*], or either of them, or their or either of their heirs, or any other person or persons whomsoever lawfully claiming by, from, through, under, or in trust for them or either of them; *And that* free and clear, and freely and clearly acquitted, released, and discharged, or otherwise by them the said [*vendors*] respectively, and their respective heirs, executors, or administrators, at their costs and charges, well and sufficiently saved harmless and kept indemnified of, from, and against all and all manner of former and other adverse estates, titles, charges, liens, and incumbrances whatsoever, had, made, done, committed, or suffered by the said [*vendors*], or either of them, or any person or persons whomsoever rightfully claiming or to claim by, from, through, under, or in trust for them, or any or either of them, or by or through their or any or either of their acts, defaults, privity, consent, or procurement; *And moreover*, that they the said [*vendors*] respectively, and their respective heirs, and all persons whosoever lawfully or equitably claiming, or to claim, any estate or interest in the said piece or parcel of land and hereditaments, or any part thereof, by, from, through, under, or in trust for them, or either of them, shall and will from time to time, and at all times hereafter, upon every reasonable request of any person or persons entitled or to be entitled to any estate or interest under the

—That they have power to appoint.

—That land shall remain to uses.

Free from incumbrances.

And for further assurance.

TO DEVISEES OF DECEASED PURCHASER.

uses or trusts hereinbefore contained, and at the costs and charges of the person or persons by whom such request shall be made, make, do, and execute, or cause or procure to be made, done, and executed, all such further and other lawful and reasonable acts, deeds, conveyances, and assurances in the law whatsoever, for the more effectually appointing, conveying, confirming, or otherwise assuring the said piece or parcel of land and hereditaments hereby appointed and released, or intended so to be, with the appurtenances, to the uses, and upon and for the trusts, intents, and purposes hereinbefore limited and declared of and concerning the same, according to the true intent and meaning of these presents, as by the person or persons making such request, or his, her, or their counsel in the law, shall be reasonably devised, or advised and required. IN WITNESS, &c.

BY TWO DEVISEES OF DECEASED VENDOR (TENANTS IN COMMON).

RELEASE *in Fee by* DEVISEES, *being* TENANTS *in* COMMON IN FEE, *in* EXECUTION *of a* CONTRACT FOR SALE ENTERED *into by the* TESTATOR (*a*).

Parties.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*grantors*], of &c., of the one part; and [*purcha-*

Remarks upon the precedent in the text.

(*a*) This precedent exemplifies the form of a conveyance by tenants in common, being devisees of a deceased owner, who, subsequently to the will, had sold the property, but died before the execution of the conveyance. In such a case, as the contract revokes the will in equity, only the legal estate passes to the devisees, from whom, therefore, the purchaser must take his conveyance. Hence it follows, that, if the limitations in the will are such as would render it inconvenient or impossible for the persons interested under those limitations to vest a good title in the purchaser, as, where the devise is to uses in strict settlement, a testator, who has contracted for the sale of property so devised, ought, immediately after the sale, to execute a short codicil, vesting it in trustees, upon trust to carry into effect his contract, and directing also the destination of the purchase-money, unless it be intended that it shall fall into the general personal estate. The exe-

BY TWO DEVISEES OF DECEASED VENDOR (TENANTS IN COMMON).

ser], of &c., of the other part; WHEREAS [*vendor*], of &c., being seised for an estate in fee-simple in possession of the hereditaments hereinafter mentioned, made and executed his last will and testament in writing, bearing date the —— day of ——, duly executed and attested as by law is required for the devise of freehold estates, and thereby gave and devised all his real estate whatsoever and wheresoever, unto and to the use of his sons, the said [*grantors*], their heirs and assigns, for ever, as tenants in common; and appointed the said [*grantors*] executors of his said will; AND WHEREAS the said [*vendor*] departed this life without having revoked or altered the hereinbefore recited devise contained in his said will, and the same will was, on the —— day of —— last, duly proved by the said [*grantors*], in the Prerogative Court of the Archbishop of Canterbury; AND WHEREAS, subsequently to the date and execution of the hereinbefore recited will, namely, on the —— day of ——, the said [*vendor*] entered into a contract in writing with the said [*purchaser*], for the absolute sale to him the said [*purchaser*] of the said messuage or tenement, lands, and hereditaments hereinafter described, and hereby released or intended so to be, for an estate of inheritance in fee-simple, free from all incumbrances, at or for the price or sum of £——, and which sum it was agreed should be paid to the said [*vendor*] immediately on the execution of the deed or deeds of conveyance of the said hereditaments; AND WHEREAS the said recited contract remained unexecuted and unperformed at the time of the decease of the said [*vendor*], the said purchase money of £——, or any part thereof, not having been paid by the said [*purchaser*], and no conveyance of the said hereditaments contracted to be sold, or of any part there-

Recital of vendor's will.

—Vendor's death.

—Contract for sale.

—That contract was not executed in vendor's life-time.

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cutor or administrator, where he is not also the devisee of the property, (as occurs in the present instance), will be an additional party to the conveyance, for the purpose of acknowledging the receipt of the purchase-money. And it may be observed, that where, for any cause, as that of the deceased vendor having made a voluntary settlement of the sold property, or otherwise, the contract could not have been enforced by him against the purchaser, the persons interested in his personal estate are not entitled to insist on its being carried into effect, and, therefore, the property remains unconverted. See *Johnson* v. *Legard*, 1 Turn. & Russ. 281.

BY TWO DEVISEES OF DECEASED VENDOR (TENANTS IN COMMON).

of, having been made or executed by the said [*vendor*]; AND WHEREAS the said [*purchaser*] has requested the said [*grantors*] to carry into effect the said recited contract entered into by the said [*vendor*], by conveying and assuring the said messuage or tenement, lands, and hereditaments, in manner hereinafter mentioned. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said contract entered into by the said [*vendor*] with the said [*purchaser*], and in consideration of the sum of £——, of lawful money of Great Britain and Ireland, to the said [*grantors*] in hand well and truly paid by the said [*purchaser*], on or immediately before the execution of these presents, the receipt of which said sum of £——, they the said [*grantors*] do hereby acknowledge, and from the same do, and each of them doth release and discharge the said [*purchaser*], his heirs, executors, administrators, and assigns, They the said [*grantors*], according to their respective parts or shares aforesaid, *Have*, and each of them *Hath* granted, bargained, sold, and released, and by these presents *Do*, and each of them *Doth* grant, &c. unto the said [*purchaser*] and his heirs, (in the actual possession of the said [*purchaser*] now being, by virtue of a bargain and sale to him thereof made by the said [*grantors*], in consideration of 5*s*. a-piece, by indenture bearing date the day next before the day of the date of these presents (*b*), for the term of one year, commencing from the day of the date of the said indenture of bargain and sale, and by force of the statute made for transferring uses into possession), ALL THAT &c., Together with all and singular houses, &c., And the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of all and singular the said

—Purchaser's desire that premises should be limited to uses after mentioned.

Testatum.

Grantors, in consideration of purchase-money, convey to purchaser.

Reference to lease for a year.

Effect of erroneous reference to lease for a year.

(*b*) If it should turn out that the bargain and sale for a year was dated two days before the release, instead of one day as here mentioned, this inaccuracy would not affect its validity. *Ramsbottam* v. *Tunbridge*, 2 Mau. & Selw. 434. It is enough, that there was, at the time of the execution of the release, an actual estate in the releasee under the bargain and sale, susceptible of enlargement, and whether this was for a year or any other term would be immaterial; but the estate bargained and sold must be a term only, and not an estate of freehold, otherwise the bargain and sale would require enrolment.

BY TWO DEVISEES OF DECEASED VENDOR (TENANTS IN COMMON).

messuage or tenement, lands, and hereditaments, hereinbefore released or otherwise assured, or intended so to be; And all the estate, right, title, interest, property, claim, and demand whatsoever, both at law and in equity, of them the said [*grantors*], and each of them, in, to, out of, or upon the said premises; To HAVE AND TO HOLD the said messuage or tenement, lands, hereditaments, and all and singular other the premises hereinbefore released, or otherwise assured, or intended so to be, with their appurtenances, unto the said [*purchaser*], his heirs and assigns, for ever, To THE USE of the said [*purchaser*], his heirs and assigns, for ever (*c*); AND each of them the said [*grantors*] (*d*), so far as relates to his respective undivided moiety of and in the said messuage or tenement, lands, and hereditaments, and not further or otherwise, doth for himself and his respective heirs, executors, and administrators, covenant and agree with the said [*purchaser*] and his heirs, by these presents, in manner following, (that is to say), that, for and notwithstanding any act, deed, matter, or thing whatsoever by them the said [*grantors*], or either of them, or by the said [*vendor*] deceased, made, done, omitted, committed, or executed, or knowingly suffered to the contrary, they the said [*grantors*], or one of them, now have or hath in themselves or himself good right, full power, and lawful and absolute authority, to grant, bargain, sell, release, and convey the said messuage or tenement, lands and hereditaments, hereby released or otherwise assured, or intended so to be, with their appurtenances, to the uses and in manner aforesaid, according to the true intent and meaning of these presents; And that it shall be lawful (*e*) for the said [*purchaser*], his heirs and assigns, from time to time, and at all times hereafter, peaceably and quietly to hold and enjoy the said messuage or tenement, lands, and hereditaments, hereby released or otherwise assured, or

All the estate, &c.

Habendum.

Use.

Covenants by grantors.

—That they have right to convey.

And for peaceable enjoyment.

(*c*) If to uses to prevent dower, vary it, *ut ante*, Vol. 7, p. 461.

(*d*) When the purchase-money does not go to the conveying parties, they of course would object to covenant for the title. In that case, the parties beneficially entitled to the monies arising from the sale should enter into the covenant.

(*e*) If the property is limited to uses to prevent dower, vary this covenant *ut ante*, p. 73.

BY TWO DEVISEES OF DECEASED VENDOR (TENANTS IN COMMON).

intended so to be, with their appurtenances, and to receive and take the rents and profits thereof, and of every part thereof, for his and their own use and benefit, without any lawful eviction, interruption, claim, or demand whatsoever, of or by them the said [*grantors*], or either of them, their, or either of their heirs, or of or by any other person or persons lawfully or equitably claiming, or to claim, by, from, or under, or in trust for them or any of them, or from, under, or in trust for the said [*vendor*], deceased; *And that* free and clear, and freely and clearly, and absolutely acquitted, exonerated, released, and for ever discharged, or otherwise by the said [*grantors*], and each of them, and their and each of their heirs, executors, and administrators, effectually kept harmless and indemnified, of, from, and against all and all manner of [former and other gifts, grants, bargains, sales, jointures, dowers, right and title of dower, uses, trusts, intails, wills, statutes merchant or of the staple, recognizances, judgments, executions, extents, rents, arrears of rent, annuities, legacies, sums of money, yearly payments, forfeitures, re-entries, cause and causes of forfeiture and re-entry, debts of record, debts due to the King's Majesty, and of, from, and against all other (*f*)] estates, titles, troubles, charges, debts, and incumbrances whatsoever, either already or to be hereafter made, executed, occasioned, or suffered by the said [*grantors*], or either of them, their or either of their heirs, or by any other person or persons lawfully claiming by, from, under, or in trust for them or any of them, or by, from, under, or in trust for the said [*vendor*] deceased, or by or through their or any or either of their acts, default, privity, consent, or procurement; AND *further*, that they the said [*grantors*], and each of them, and their and each of their heirs, and all and every other persons or person lawfully claiming any estate, right, title, or interest whatsoever, either at law or in equity, in, to, or out of the said messuage or tenement, lands, and hereditaments hereby released, or intended so to be, by, from, or under, or in trust for them the said [*grantors*], or either of them, or by, from,

Free from incumbrances.

And for further assurance.

(*f*) This enumeration of incumbrances may be properly omitted, as they are all embraced in the words following the brackets.

BY TWO DEVISEES OF DECEASED VENDOR (TENANTS IN COMMON).

under, or in trust for the said [*vendor*], deceased, shall and will, from time to time, and at all times hereafter, upon the request and at the costs of the said [*purchaser*], his heirs or assigns, make, do, acknowledge, levy, suffer, and execute, or cause and procure to be made, &c., all such further and other lawful acts, deeds, things, devices, conveyances, and assurances in the law whatsoever, for the more effectually granting, conveying, and assuring of the said messuage or tenement, lands and hereditaments hereby released, or intended so to be, unto and to the use of the said [*purchaser*], his heirs and assigns, for ever, in manner aforesaid, and according to the true intent and meaning of these presents, as by the said [*purchaser*], his heirs or assigns, or his or their counsel in the law, shall be reasonably advised or required; so as no such further assurance or assurances contain or imply any further or other covenant or warranty than against the person or persons who shall be required to make or execute the same, and his, her, or their heirs, executors, or administrators, acts and deeds only, and so as the party or parties who shall be required to make or execute such further assurance or assurances, be not compelled or compellable for the making or doing thereof, to go or travel from his, her, or their usual place or places of abode. IN WITNESS, &c.

APPOINTMENT BY A MARRIED WOMAN.

APPOINTMENT *by a* MARRIED WOMAN *under a general* POWER *of* APPOINTMENT, *the Purchase-money being paid to the* HUSBAND, *who* COVENANTS *for the* TITLE. *(Variation where the Purchase-money is paid to a Trustee as the separate Property of the Wife).*

Parties.

THIS INDENTURE, made the —— day of ——, in the year ——, BETWEEN [*wife*], the wife of [*husband*], of &c., of the first part; the said [*husband*], of the second part; and [*purchaser*], of &c., of the third part.

Recital of settlement.

WHEREAS, by indentures of lease and release, bearing date respectively on or about the —— and —— days of ——, in the year ——, and expressed to be made between the said [*wife*], by her then name and description of [*wife by maiden name*], of the one part, and [A. B.], of the other part, ALL THOSE *(describe parcels)*, were (with other hereditaments), conveyed and assured, and now stand limited to and for the use and behoof of such person and persons, for such estate and estates, use and uses, whether absolute or conditional, and with or without power of revocation and new appointment, as she the said [*wife*], then [*wife by maiden name*], whether married or sole, should from time to time, and at any time hereafter, in or by any deed or deeds, writing or writings, to be by her sealed and delivered in the presence of two or more credible witnesses attesting the same, direct, limit, or appoint; and for want of and subject to such limitation or appointment, *To the use* of the said [*wife*], then [*wife by maiden name*], and of her heirs and assigns, for ever;

Marriage of donee of power.

AND WHEREAS the said [*wife by maiden name*], on or about the —— day of ——, in the year ——, intermarried with and she is now the wife of the said [*husband*];

Contract for sale.

AND WHEREAS the said [*husband*], at the request of the said [*wife*], hath contracted and agreed with the said [*purchaser*] for the absolute sale to him of the said messuage or tenement, lands, and he-

APPOINTMENT BY A MARRIED WOMAN.

reditaments hereinbefore mentioned, and the fee-simple and inheritance thereof, free from incumbrances, at or for the price or sum of £——. NOW THIS INDENTURE WITNESSETH, that, in pursuance of and for effectuating the said recited agreement, and in consideration of the sum of £——, of lawful money of Great Britain and Ireland, paid by the said [*purchaser*] to the said [*husband*], at the request and by the direction of the said [*wife*] (*a*), the receipt and payment of which said sum, and that the same is in full for the absolute purchase of the messuage or tenement, lands, and hereditaments hereby appointed, and the fee-simple and inheritance thereof, free from all incumbrances whatsoever, the said [*husband*] and [*wife*] do, and each of them doth hereby acknowledge, and therefrom do and each of them doth release and discharge the said [*purchaser*], his heirs, executors, administrators, and assigns; the said [*wife*], pursuant to and by virtue and in exercise of the power or authority given or reserved to her by the said indenture of release hereinbefore recited, and of every other power and authority whatsoever in anywise enabling her in this behalf, by this present deed or writing, sealed and delivered by her in the presence of the two credible persons whose names are intended to be hereupon indorsed as witnesses attesting her execution of these presents, doth absolutely and irrevocably direct, limit, and appoint that the said messuage or tenement, lands, hereditaments, and premises, hereinbefore mentioned and comprised in the said indentures of lease and release hereinbefore recited, and every part of the same, with their and every of their rights, members, and appurtenances, shall from henceforth remain, continue, and be TO THE USE

Testatum.

In consideration of purchase-money paid to the husband, donee of power appoints.

To the use of the purchaser in fee.

(*a*) Sometimes the purchase-money is paid to a trustee on behalf of the wife as her separate property, and in that case the clause in the text may be varied as follows:—

Variation where purchase-money is paid to a trustee as the separate property of the wife.

"In consideration of the sum of £——, of &c., paid by the said [*purchaser*] to the said [*trustee*], at the request and by the direction of the said [*wife*], which said sum of £—— she doth hereby appoint to be held by the said [*trustee*], In trust for the sole and separate use of her the said [*wife*]."

APPOINTMENT BY A MARRIED WOMAN.

of the said [*purchaser*], his heirs and assigns, for ever (*b*), And to or for no other use, intent, and purpose whatsoever. *(Add covenants by the husband that, notwithstanding any act, &c. by the wife she has power to appoint, and for quiet enjoyment, free from incumbrances created or occasioned by the wife, and for further assurance).* IN WITNESS, &c.

As to the addition of a release to the appointment in certain cases.

(*b*) Where the lands, in default of appointment by the wife, are limited to the husband, or to a trustee for the wife, it would be proper, according to the precaution usual in cases of this nature, to add a release to the appointment. But where the limitation over in default is, as in the present instance, to the wife herself, as she is incompetent to convey without a fine, and the purchaser is seldom disposed to incur the expense of a fine as a mere precautionary measure, he generally relies for the sufficiency of his conveyance wholly upon the validity of the appointment, and therefore should be the more vigilant in ascertaining that the requisitions of the power in regard to attestation, &c. are duly attended to.

ASSIGNMENT OF LEASEHOLDS BY A MARRIED WOMAN AND HER TRUSTEES.

ASSIGNMENT *on a* PURCHASE *of* LEASEHOLDS, *vested in the* TRUSTEES *of a* MARRIAGE SETTLEMENT, *subject to an* ABSOLUTE POWER *of* APPOINTMENT *in the* WIFE. *The* HUSBAND COVENANTS *for the* TITLE (*a*), *and for the* PRODUCTION *of the* SETTLEMENT.

Parties.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*trustees*], of &c., of the first part; [*wife*], wife of

As to the husband's covenants for the title.

(*a*) The husband is made a party, not for the purpose of perfecting the title, which would be complete without his concurrence, but in order to covenant for the title and the production of the settlement. In such a case as the present, the husband is the only person from whom such covenants can be obtained, for the wife is incapable of binding herself by covenant; and the trustees, having no beneficial interest, would object to incur any personal responsibility. The husband, of course, is under no obligation to enter into the covenants, unless he has specially contracted with the purchaser to do so. Trustees, therefore, who contract for the sale

ASSIGNMENT OF LEASEHOLDS BY A MARRIED WOMAN AND HER TRUSTEES.

[*husband*], of &c., of the second part; the said [*husband*], of the third part; and [*purchaser*], of &c., of the fourth part. WHEREAS, by indenture of lease, bearing date on or about the —— day of ——, and made between [*lessor*], therein described, of the one part, and the said [*wife*], then [*wife by maiden name*], of the other part, for the considerations therein mentioned, He, the said [*lessor*], did demise, lease, and to farm let unto the said [*wife*], her executors, administrators, and assigns, ALL THAT, &c., *(describe parcels, consisting of a piece of ground and a messuage erected thereon)*, *To hold* the same unto the said [*wife*], her executors, administrators, and assigns, during the term of —— years thence next ensuing, at the yearly rent of £——, payable quarterly, and subject to certain conditions and covenants therein contained, on the part of the said [*wife*], her executors, administrators, and assigns, to be observed and performed; AND WHEREAS, by an indenture of settlement, bearing date on or about the —— day of ——, made between the said [*husband*], of the first part, the said [*wife*], then [*wife by maiden name*], of the second part, and the said [*surviving trustees*] and [*deceased trustee*], therein described and now deceased, of the third part, (being the settlement executed previously to the marriage then intended to be and since solemnized between the said [*husband*] and [*wife*], his wife), the said [*wife*] assigned unto the said [*trustees*], their executors, administrators, and assigns, the said leasehold —— and premises, *To hold* unto the said [*trustees*], their executors, administrators, and assigns, for all the residue then unexpired of the said term of —— years; *Upon trust* (after the solemnization of the said marriage) that the said [*trutsees*], their executors, administrators, and assigns, should, from time to time and at all times thereafter, assign and transfer the said trust premises to such person or persons, in such shares and proportions, for such estate and interest, upon such trusts, and to and for such intents and purposes, and with, under, and subject to such powers, provisions, declarations, and limitations, and in such

Recital of lease.

—Of settlement.

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of property, the beneficial interest in which belongs to a married woman, should, to prevent dispute with respect to the covenants, announce this fact to the purchaser.

ASSIGNMENT OF LEASEHOLDS BY A MARRIED WOMAN AND HER TRUSTEES.

manner as the said [*wife*] should, notwithstanding the said then intended coverture, by any deed or deeds, writing or writings, to be by her sealed and delivered in the presence of and attested by two or more credible witnesses, or by will as therein mentioned, declare, limit, direct, or appoint, give, or bequeath the same; and for default of, and in the meantime and until some such declaration, limitation, direction, or appointment, gift, or bequest should be made as aforesaid, *Upon trust* to pay and apply the rents and profits thereof unto the said [*wife*], during the joint lives of herself and the said [*husband*], her then intended husband, for her sole and separate use and benefit, exclusive of the said [*husband*], her said intended husband, and not to be subject or liable to his debts, control, or en-engagements; And after the decease of the said [*wife*], upon certain trusts in the said indenture mentioned; AND WHEREAS the said [*deceased trustee*] departed this life in or about the month of ——, leaving the said [*surviving trustees*], his co-trustees, him surviving, and was interred in the burial-ground of the parish of ——. AND WHEREAS the said [*surviving trustees*], at the request of the said [*wife*], have contracted with the said [*purchaser*] for the absolute sale of the said leasehold premises, at the price or sum of £——, And the said [*husband*], at the request of the said [*wife*], has agreed to enter into the covenants on his part hereinafter contained. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of £——, of lawful money of Great Britain and Ireland, paid by the said [*purchaser*] (*b*) to the said [*wife*], as and for her separate monies and estate, (with the privity of the said [*husband*],) at or immediately before the execution of these presents, the receipt whereof, and that the same is in full for the absolute purchase of the premises hereby assigned, she the said [*wife*] doth hereby acknowledge, and from the same she, together with the said [*husband*], her husband, Do, and each

Death of one of the trustees.

Contract for sale.

Testatum.

In consideration of purchase-money, trustees, by direction of wife, assign to purchaser.

Variation where purchase-money is paid to the husband.

(*b*) If the purchase-money is paid to the husband, say—

"to and for the absolute use of the said [*husband*], by the direction of the said [*wife*], testified by her executing these presents."

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of them Doth release and discharge the said [*purchaser*], his heirs, executors, administrators, and assigns; And also, in consideration of 10*s.* of lawful money aforesaid, at the same time paid by the said [*purchaser*] to the said [*surviving trustees*], the receipt whereof is hereby acknowledged, They the said [*surviving trustees*], at the request and by the direction of the said [*wife*], testified by her executing these presents in the presence of two credible witnesses, and which also are or are intended to be attested by the same witnesses, *Have*, and each of them *Hath* bargained, sold, assigned, and transferred, and by these presents *Do*, and each of them *Doth* bargain, sell, assign, and transfer; And the said [*wife*], by this deed or writing, sealed and delivered by her, and attested as aforesaid, *Doth* grant and confirm, limit, direct, and appoint, And also the said [*husband*] *Hath* granted and confirmed, and by these presents *Doth* grant and confirm, unto the said [*purchaser*], his executors, administrators, and assigns, all and singular the —— and premises hereinbefore described, and all other the premises, if any, comprised in and demised by the hereinbefore in part recited indenture of lease, And all and singular the rights, members, and appurtenances to the said premises or any part thereof belonging or appertaining, or therewith usually held or enjoyed, Together with the said indenture of lease, and the full and whole force, benefit, and effect thereof; And all the estate, right, title, interest, benefit, claim, and demand whatsoever, both at law and in equity, of them the said [*surviving trustees*], [*wife*], and [*husband*] respectively, in and to the said premises, and every part thereof; To HAVE AND TO HOLD the said piece or parcel of ground, messuage, or tenement, and other the premises hereby assigned, or intended so to be, unto the said [*purchaser*], his executors, administrators, and assigns, henceforth for all the residue and remainder now to come and unexpired of the said term of —— years, granted by the hereinbefore recited indenture of lease, and for all other the estate, term, and interest of them the said [*surviving trustees*], [*wife*], and [*husband*], respectively, in or to the said premises, or any part thereof; subject, nevertheless, to the payment of the rent, and the observance and performance of the covenants, conditions, and agreements reserved and contained in and by the said recited indenture, and which, on the part of the said

All the estate, &c.

Habendum.

ASSIGNMENT OF LEASEHOLDS BY A MARRIED WOMAN AND HER TRUSTEES.

[*wife*] therein named, her heirs, executors, administrators, or assigns, ought henceforth to be paid, observed, and performed. AND the said [*surviving trustees*], for themselves respectively, and their respective heirs, executors, and administrators, but each of them as to and concerning his own acts, deeds, and defaults only, hereby severally covenant with the said [*purchaser*], his executors, administrators, and assigns, that they the said [*surviving trustees*] have not, nor hath either of them, at any time heretofore, made, done, executed, or permitted any act, deed, matter, or thing, by means whereof the said premises hereby assigned, or intended so to be, or any part thereof, are or is charged, incumbered, or in anywise prejudicially affected in title, estate, or otherwise howsoever. AND the said [*husband*], for himself, his heirs, executors, and administrators, hereby covenants and agrees with the said [*purchaser*], his executors, administrators, and assigns, That notwithstanding any act, deed, matter, or thing whatsoever, made or done, or permitted to be made or done to the contrary by the said [*wife*], the said hereinbefore recited indenture of lease is a good, valid, and subsisting lease in the law for the premises thereby demised, and is still in full force for all the residue now unexpired of the said term of —— years thereby granted (*c*); *And that*, notwithstanding any such act, deed, matter, or thing as aforesaid, the said [*surviving trustees*], [*wife*], and [*husband*], now have in themselves, or one of them now has in himself or herself, full power by these presents to assign, appoint, or otherwise assure the said premises hereby assigned or appointed, or intended so to be, unto the said [*purchaser*], his executors, administrators, and assigns, for all the residue which is now unexpired of the said term of —— years, in manner aforesaid, according to the true intent and meaning of these presents; *And further*, that, subject to the payment of the rent, and the observance and performance of the covenants, conditions, and agreements reserved and contained by and in the said recited indenture of lease, and which, from the day of the date of these presents, (*or* from the —— day of —— last, *as the case may be*), ought to be paid, observed, and performed, it shall be

Covenant by trustees that they have not incumbered.

Covenant by husband that lease is valid.

—That assignors have power to assign.

—And, subject to the rent, &c. for quiet enjoyment.

(*c*) This first covenant may be omitted; it is included in the next.

ASSIGNMENT OF LEASEHOLDS BY A MARRIED WOMAN AND HER TRUSTEES.

lawful for the said [*purchaser*], his executors, administrators, and assigns, henceforth at all times hereafter during the continuance of the said term, to hold and enjoy the said premises, and to take the rents and profits thereof, to and for his and their own use, without any eviction, interruption, or denial whatsoever, from or by the said [*wife*], or any person or persons whomsoever, claiming from, through, under, or in trust for her; *And also*, that the said premises are free and discharged, or by the said [*husband*], his heirs, executors, or administrators, will be kept effectually indemnified from and against all former and other estates, rights, titles, charges, and incumbrances whatsoever, at any time or times heretofore made, created, or occasioned by the said [*wife*], or any person or persons claiming under or in trust for her, or by or through his, her, or their acts, defaults, privity, consent, means, or procurement; *And further*, that the said [*wife*], her executors or administrators, and every other person whosoever claiming any estate, right, title, or interest at law or in equity, in or to, or out of the said premises, or any part thereof, from, under, or in trust for her, will, from time to time, and at all times hereafter, upon every reasonable request, and at the costs and charges of the said [*purchaser*], his executors, administrators, or assigns, make, do, or execute and perfect every such lawful and reasonable act, deed, assignment, or assurance in the law whatsoever, for more effectually assigning and assuring the said premises hereby assigned, or intended so to be, unto the said [*purchaser*], his executors, administrators, or assigns, thenceforth, for all the residue or remainder which shall be then unexpired of the said term of —— years, in manner aforesaid, according to the true intent and meaning of these presents, as by the said [*purchaser*], his executors, administrators, or assigns, or his or their counsel in the law, shall be reasonably advised and required; *And lastly*, that the said [*husband*], his executors or administrators, (unless prevented by fire or some other inevitable accident), will, at any time or from time to time hereafter, upon every reasonable request in writing, and at the costs and charges of the said [*purchaser*], his executors, administrators, or assigns, produce, or cause or procure to be produced, to him the said [*purchaser*], his executors, administrators, or assigns, or his or their attorney, solicitor, agent, or

Free from incumbrances.

And for further assurance.

—For the production of the settlement.

ASSIGNMENT OF LEASEHOLDS BY A MARRIED WOMAN AND HER TRUSTEES.

counsel, or before any Court or Courts of law or equity, or otherwise as occasion shall require, the hereinbefore recited indenture of settlement, of the —— day of ——; And also that the said [*husband*], his executors, or administrators, will from time to time, upon the like request and at the like costs and charges of the said [*purchaser*], his executors, administrators, or assigns, furnish, or cause or procure to be furnished to him or them, a copy or abstract of the said indenture, or any part thereof, (the said copy to be properly attested if required), and will also permit the said [*purchaser*], his executors, administrators, or assigns, or any person or persons to be appointed by him or them, to examine and compare the same with the original (*d*); And the said [*purchaser*], for himself, his heirs, executors, and administrators, doth hereby covenant with

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As to the husband's covenant for the production of the settlement.

(*d*) Here the settlement was in the possession of the wife, who, being incapable of covenanting for its production, the husband agreed to do so. If he had objected to enter into the covenant, the difficulty might have been surmounted by delivering the settlement over to the trustees, and inducing them to covenant for its production; their covenant being qualified, as such covenants are when entered into by persons who have a fiduciary interest only. *Vide ante*, Vol. 4, p. 8. Of course, it is not necessary to the obligatory force of a covenant for the production of deeds, that the covenanting party should have the custody of them at the time; for if a man covenants to do an act, the performance of which requires the concurrence of a third person, it is his own folly, and the consequences will fall on himself. But, as the object of a covenantee in such cases is to secure the production of the deeds, and not to become plaintiff in an action for damages, it is generally matter of prudence for him to ascertain that the proposed covenantor is in such a situation as to render it probable that he will be able to produce the deeds; and a purchaser, it is clear, would not be bound to accept the covenant of any person not having the custody of the deeds. Where it can be done with safety, it is better to deliver the deed of settlement to the purchaser, than contract the indefinite liability incident to a covenant for its production. In the present case, however, it would not be proper to part with the deed, even though it related to no other than the sold property, since it might be necessary for the wife to preserve evidence of the money paid to her being her separate estate, which would best be shewn by the production of the settlement. The weight due to this consideration would depend upon the intended destination of the money. If the wife meant to settle it upon trusts for her separate benefit, the retention

ASSIGNMENT OF LEASEHOLDS BY A MARRIED WOMAN AND HER TRUSTEES.

the said [*wife*], her executors, or administrators, That the said [*purchaser*], his heirs, executors, administrators, or assigns, will, from to time hereafter during the residue of the said term of —— years, duly pay the said rent of £——, and observe and perform the several covenants, conditions, and agreements reserved and contained by and in the said recited indenture of lease, on the part of the said [*wife*], her heirs, executors, administrators, or assigns, to be paid, observed, and performed; And also will, at all times hereafter, effectually keep indemnified the said [*wife*], her heirs, executors, and administrators, from and against all actions, suits, and other proceedings, And also from and against all losses, damages, and expenses, by reason of the non-payment of the said rent, or the non-observance or non-performance of the said covenants, conditions, and agreements, or any of them, or by reason of any other matter or thing in anywise relating thereto (*e*). In witness, &c.

Covenant by purchaser to indemnify the wife from the rent and covenants.

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of the settlement would be important, but not if she intended to pay it over to her husband.

(*e*) This covenant is made with the wife, because she is subject to the covenants entered into by her while sole, as lessee; and though the trustees of the settlement were liable to the rent and covenants, as assignees of the term, yet, as this liability was contemporaneous with their ownership only, and ceased on the alienation of their interest by the present deed, (except, of course, as to any breach already made), it is unnecessary, and would therefore be incorrect, to make the covenant extend to them.

Remarks upon the indemnity covenant.

And here it may be suggested, that where trustees of a settlement, who are invested with a power of sale, dispose of leaseholds, perhaps it may be a question whether they can require from the purchaser, on behalf of the settlor, not being a necessary concurring party in the sale, an indemnity against the rent and covenants of the lease. It has been decided that assignees in bankruptcy are not entitled to make such a requisition on the part of the bankrupt; (*vide ante*, Vol. 7, p. 488); and perhaps that case is not very broadly distinguishable from the present; for it is the duty of trustees to make the most of the property for the benefit of the *cestuis que trust*, in like manner as it is the duty of assignees to deal with the bankrupt's property to the utmost advantage on the part of the creditors. If trustees cannot, without an express stipulation, require such a covenant, it would probably be deemed wrong in them to prejudice the sale by making it the subject of express stipulation in the contract. It has been decided that a purchaser, even without any ex-

press covenant, is bound to indemnify the vendor against the covenants of the lease, during the time he is in possession as assignee; *Burnett* v. *Lynch*, 5 Barn. & Cress. 589; but where the vendor himself is not liable, of course this principle has no room to operate.

PURCHASE BY TRUSTEES UNDER A POWER.

RELEASE *in* FEE *on a* PURCHASE *by* TRUSTEES *under a* POWER *in a Marriage Settlement, with the Consent of the Parties beneficially interested (a), the Conveyance being made to the Uses of the Settlement.*

THIS INDENTURE, made the —— day of ——, 18—, Parties. BETWEEN [*vendor*], of &c., of the first part; [*husband*], of

Difference in mode of conveyance, where the trustees take the legal estate, and where not.

(*a*) Where the trustees of a settlement are empowered to lay out trust-monies in the purchase of lands, it is usual not to disclose the trusts upon the face of the deed of conveyance, but to convey the property to them simply as absolute owners, making them declare the trusts by a separate deed; the advantage of which course is, that it prevents the unnecessary disclosure of the affairs of families, and also that it enables the trustees to sell again as beneficial owners, the propriety of such a proceeding of course depending upon the nature of the trust. The trustees might indeed sell, even if the conveyance were made expressly upon the trusts of the settlement, provided the sale were consistent with the trusts; but there would even then be this inconvenience, that the settlement having become part of the evidence of title, any person purchasing from the trustees would require a covenant from them for the production of it, the necessity for which would be avoided where they both buy and sell as beneficial owners; but in the latter case they would be expected to enter into the usual vendor's covenants for title, unless they precluded the requisition by express stipulation. On the other hand, where the legal inheritance is not to be vested in the trustees, but the property is to be conveyed to the uses of the settlement, as in the present case, it is impossible to avoid disclosing the settlement without the circuity of two conveyances, and this would be attended with little advantage, since, on any future sale of or dealing with the property, the settlement would not be kept out of view, inasmuch as the legal as well as beneficial interest is subject to the limitations in the settlement; and therefore the trustees

PURCHASE BY TRUSTEES UNDER A POWER.

Recital of settlement, containing the power to purchase.

&c., and [*wife*], his wife, of the second part; and [*purchasers*], of &c., of the third part; *(recite the assurance or other means by which the vendor became seised in fee):* AND WHEREAS, by indentures of lease and release, bearing date respectively the —— and —— days of ——, the indenture of release being made between the said [*husband*], of the first part; the said [*wife*], then [A. B.], spinster, of the second part; and the said [*purchasers*], of the third part, (being the settlement executed previously to the marriage of the said [*husband*] and [*wife*], his wife), certain freehold hereditaments were conveyed and assured to the uses, upon the trusts, and for the intents and purposes, and subject to the powers, provisoes, and declarations therein expressed and declared concerning the same (*b*); And in and by the said indenture, 5000*l.* Three *per cent.* Consolidated Annuities were settled and assured upon certain trusts therein mentioned; In which said indenture of settlement was contained a power enabling the said [*purchasers*], or the survivor of them, or the executors or administrators of such sur-

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must expressly exercise their power of sale and revocation in order to vest the property in the purchaser. The precedent in the text, it will be seen, has been prepared in this form.

It may be farther observed, that, where the trusts, under which a purchase of lands is made, are created by will, the reasons which have been suggested for not disclosing the trusts on the face of the deed of conveyance do not apply, as a will is a public document.

Variation where uses of settlement are recited.

(*b*) If the limitations in the settlement are recited, the recital in the text will be varied thus:—

"To the uses, &c., thereinafter expressed and declared, and hereinafter recited concerning the same, (that is to say), To the use," &c., *(setting forth the uses at length).*

But where brevity is desirable, (and where is it not desirable?) the statement of the uses of the settlement may be dispensed with, reference being made to them merely as in the precedent in the text. Indeed, little or no advantage is gained by the recital of the limitations, (except perhaps in the event of the settlement being lost), since such a recital, however copious, would not induce a purchaser from the trustees selling under a power in the settlement, or from the *cestuis que use,* to dispense with the production of the settlement, and having its future production secured to him.

PURCHASE BY TRUSTEES UNDER A POWER.

vivor, with the consent in writing of the said [*husband*] and [*wife*], his wife, or the survivor of them, to sell and dispose of the said 5000*l.* Three *per cent.* Consolidated Annuities, or any part thereof, and to lay out and invest the monies arising from such sale in the purchase of freehold or copyhold hereditaments held for an estate in fee-simple, and which hereditaments, when so purchased, should be settled and assured to the uses, upon the trusts, and subject to the powers, provisoes, and declarations expressed and declared concerning the freehold hereditaments thereby settled and assured, or such of the said powers, provisoes, and declarations as should be then subsisting, undetermined, and capable of taking effect.

Contract for purchase.

AND WHEREAS the said [*purchasers*], in pursuance of the hereinbefore recited power contained in the said indenture of settlement, have, with the consent of the said [*husband*] and [*wife*], testified by their severally executing these presents, contracted and agreed with the said [*vendor*] for the absolute purchase of the —— and hereditaments hereinafter described, and hereby released, or intended so to be, for an estate of inheritance in fee-simple, free from all incumbrances, at or for the price or sum of £——; and the said [*purchasers*], for the purpose of enabling them to pay the said purchase-money, have, with such consent as aforesaid, sold out a sufficient part of the said 5000*l.* Three *per cent.* Consolidated Annuities, which were vested in them upon the trusts of the hereinbefore recited indenture of settlement as aforesaid.

Testatum.

NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said recited contract, and in consideration of the sum of £——, of lawful money of Great Britain and Ireland, paid by the said [*purchasers*] to the said [*vendor*], at or immediately before the execution of these presents, with the consent and approbation of the said [*husband*] and [*wife*], his wife, testified by their severally executing these presents, (being the monies produced by the sale of part of the said 5000*l.* Three *per cent.* Consolidated Annuities as aforesaid), the receipt of which said sum the said [*vendor*] doth hereby acknowledge, and therefrom doth release and discharge the said [*purchasers*], their heirs, executors, administrators, and assigns, He the said [*vendor*] *hath* granted, bargained, sold, and released, and by these

Vendor, in consideration of purchase-money, releases to purchasers.

presents *doth* grant, &c., unto the said [*purchasers*] and their heirs, (in the actual possession, &c.), *(describe parcels, adding general words)*, And all the estate, &c., together with all deeds, &c., To HAVE AND TO HOLD the said ——, and all and singular other the premises hereby granted and released, or intended so to be, unto the said [*purchasers*], their heirs and assigns, for ever, To THE USES, upon the trusts, and for the intents and purposes, and subject to the powers, provisoes, and declarations in and by the hereinbefore recited indenture of release or settlement expressed and declared concerning the freehold hereditaments thereby released, or intended so to be, or such and so many of the said uses, trusts, intents, and purposes, powers, provisoes, and declarations, as are now subsisting, undetermined, and capable of taking effect; and to, for, or upon no other use, trust, intent, or purpose whatsoever. *(Add usual covenants for title* (*c*), *ut ante*, p. 72). IN WITNESS, &c.

PURCHASE BY TRUSTEES UNDER A POWER.

Habendum.

To uses of settlement.

(*c*) It is incumbent on persons who purchase an estate in a fiduciary character, to take every proper precaution with regard to the title of the lands purchased. For this purpose, the abstract should be submitted to counsel, and the purchasers should not take upon themselves to accept any title which cannot be pronounced to be marketable.

ASSIGNMENT *of* LEASE *of a* MESSUAGE *and certain scheduled* FIXTURES (*a*), *&c., in Consideration of the Assignee taking upon himself the Rent and Covenants, by Indorsement. (Short Form).*

ASSIGNMENT OF LEASE AND FIXTURES BY INDORSEMENT.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN the within-named [*assignor*], of the one part; and

Parties.

(*a*) Personal chattels pass by delivery, and a deed of assignment is not necessary to confer a title to them. The only advantage of specifying them in the present instance is, that evidence is thereby afforded of the contract between the assignor and assignee; and if a claim were set up

As to the transfer of personal chattels.

ASSIGNMENT OF LEASE AND FIXTURES BY INDORSEMENT.

[*assignee*], of &c., of the other part. WHEREAS the said [*assignor*], for the considerations hereinafter mentioned, hath agreed to assign over unto the said [*assignee*] the within-mentioned messuage or tenement and premises, together with the several goods, chattels, and effects hereinafter mentioned. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of a certain bond or obligation, bearing even date with these presents, given by the said [*assignee*] to the said [*assignor*], conditioned for the payment of the rent and the performance of the covenants reserved and contained on the lessee's part, by and in the within-written indenture of lease, he the said [*assignor*] *Doth* by these presents grant, bargain, sell, and assign unto the said [*assignee*], his executors, administrators, and assigns, *All and singular* the messuage or tenement and premises demised by the within-written indenture of lease, or intended so to be, with their and every of their appurtenances, *And* all the estate, right, title, interest, term of years to come and unexpired, property, claim, and demand whatsoever of him the said [*assignor*], in, to, or out of the same premises, together with the said indenture of lease, and together also with the household goods, tenant's fixtures, chattels, and effects particularly mentioned in the schedule hereunder written; TO HAVE AND TO HOLD

Recital of contract.

Testatum.

Assignor, in consideration of bond, assigns to purchaser the premises comprised in the lease.

Habendum as to messuage.

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to the fixtures by the lessor, it would be convenient for the assignee to be furnished with evidence of such contract, though, of course, it would not conclude the lessor. The covenant, as to the assignor's right to assign the fixtures, would enable the assignee to maintain an action against the assignor, in case of the property being proved to belong to any other person. Where a large pecuniary consideration is paid for the purchase of chattels, an objection to assigning them by deed is, that the instrument is subject to an *ad valorem* duty; for it is to be observed, that where parties choose to assign, by a written instrument, any property, to the transfer of which no written instrument is necessary, the price paid must be set forth, and the duty attaches precisely in the same manner as if the instrument had been requisite to vest in the purchaser a title to the property; for, though the parties need not have had a deed at all, yet, having one, they must impress it with the proper stamp. Tenants' fixtures have been held not to be "goods, wares, and merchandise," agreements relating to the sale of which are exempted by the stamp act from the agreement stamp. *Wick* v. *Hodgson*, 12 B. Moore, 213.

ASSIGNMENT OF LEASE AND FIXTURES BY INDORSEMENT.

the said messuage or tenement, with the appurtenances, unto the said [*assignee*], his executors, administrators, and assigns, from the day of the date hereof during all the remainder now unexpired of the term of twenty years and one quarter of another year, wanting fourteen days, granted by the within-written indenture of lease; *subject nevertheless* to the payment of the rent and performance of the covenants in the same indenture of lease reserved and contained on the tenant's or lessee's part henceforth to be paid and performed; *and subject* also to a certain underlease of part of the said messuage or tenement and premises, granted by the said [*assignor*] to [*underlessee*], of &c., by indenture, bearing date the —— day of —— now last past, for the term of seven years from the —— day of —— then instant, at the yearly rent of £——; AND TO HAVE AND TO HOLD the said goods, tenant's fixtures, chattels, and effects, unto the said [*assignee*], his executors, administrators, and assigns, as his and their own absolute property, for ever, subject nevertheless to the right and interest of the said [*underlessee*] in such of the said goods, tenant's fixtures, chattels, and effects, as are mentioned in a schedule written under the said indenture of lease of the —— day of —— last; AND the said [*assignor*], for himself, his heirs, executors, and administrators, doth hereby covenant with the said [*assignee*], his executors, administrators, and assigns (*b*), in manner following, that is to say, That, notwithstanding any act, deed, matter, or thing whatsoever, done, executed, occasioned, or suffered by the said [*assignor*] to the contrary, he the said [*assignor*] now hath full power and lawful and absolute authority to assign or otherwise assure the said leasehold premises in manner aforesaid, according to the true intent and meaning of these presents; *And that* the yearly rent, conditions, and covenants reserved and contained by and in the within-written indenture of lease, on the part of the said lessee therein named, to be paid and performed, have been duly paid and performed up to the day of the date hereof; *And that* he the said [*assignee*], his executors, administra-

Subject to an underlease.

Habendum as to fixtures.

Covenants by assignor.

—That the assignor has right to assign.

—That rent and covenants have been paid and performed up to the day of the date.

—For quiet enjoyment.

(*b*) In assigning a lease at rack rent, covenants for title are, of course, less important than where the lease is valuable; but it is not often advisable to omit them.

ASSIGNMENT OF LEASE AND FIXTURES BY INDORSEMENT.

tors, and assigns, shall, or lawfully may, during all the remainder of the said term of twenty years and one quarter wanting fourteen days, granted by the within-written indenture of lease, peaceably and quietly hold and enjoy the said leasehold premises hereby assigned, without any molestation or interruption of him the said [*assignee*], his executors or administrators, or of any person lawfully claiming through or under him or them; *And that* free and clear of and from all titles, charges, and incumbrances whatsoever, made, or knowingly suffered to be made, by the said [*assignor*], except the hereinbefore mentioned underlease of the —— day of —— last; *And further*, that he the said [*assignor*], his executors or administrators, and every other person lawfully claiming from or under him or them, (except the person whose estate and interest are hereinbefore excepted), will at all times hereafter, during the remainder of the said term of twenty years and a quarter of another year, wanting fourteen days, at the request, costs, and charges of the said [*purchaser*], his executors, administrators, or assigns, make, do, and execute all such further acts and assurances whatsoever, for more effectually assuring the said leasehold premises unto the said [*purchaser*], his executors, administrators, and assigns, for all the residue of the said term which shall be then unexpired, as the said [*purchaser*], his executors, administrators, or assigns, shall reasonably require; *And lastly*, that the said [*assignor*] (notwithstanding the act or deed of any person or persons whomsoever,) hath good right and absolute authority to bargain, sell, assign, and transfer the said household goods, tenant's fixtures, chattels, and effects mentioned in the said schedule hereunder written, unto the said [*assignee*], his executors, administrators, and assigns, in manner aforesaid, according to the true intent and meaning of these presents. IN WITNESS, &c.

—Free from incumbrances.

That the assignor has right to assign fixtures.

SCHEDULE.

THE SCHEDULE OR INVENTORY ABOVE REFERRED TO.

IN the *Front Kitchen*—a leaden cistern, ball cock, with leaden sink and leaden pipe, dresser with three drawers and shelves, pantry, dresser and shelves, and about forty feet of leaden pipe. In the *Back Kitchen*—a leaden cistern, with stone sink, and water-pipe, copper, and ironing board, Bath stove,

pantry, dresser, and shelves, with shelves in kitchen, and new mantle-shelf. In the *Parlour*—Pantheon stove, mahogany beaufet in recess, and loose mahogany window seats. In the *Front Drawing Room*—register stove with bright bars and japanned front—Iron balcony in front of the house. In *Back Drawing Room*—a Pantheon stove. In *Two-pair Front Room*—a Pantheon stove. In *Back ditto*—a Bath stove. In *Front Garret*—a Pantheon stove. In *Back ditto*—a Bath stove.

ASSIGNMENT OF LEASE AND FIXTURES BY INDORSEMENT.

ASSIGNMENT *of a* LEASEHOLD DWELLING-HOUSE *by a* LESSEE, *indorsed upon the Lease. (A very short Form).*

SHORT ASSIGNMENT OF LEASEHOLDS.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN the within-named [*lessee*], of the one part; and [*assignee*], of &c., of the other part; WITNESSETH, that, in consideration of the sum of £——, paid by the said [*purchaser*] to the said [*vendor*], for the absolute purchase of the leasehold messuage or tenement comprised in the within-written indenture of lease, the receipt of which said sum the said [*vendor*] doth hereby acknowledge, and from the same doth hereby discharge the said [*purchaser*], his executors, administrators, and assigns, the said [*vendor*] DOTH by these presents grant and assign unto the said [*purchaser*], his executors, administrators, and assigns, all and singular the messuage or tenement and other the premises comprised in and demised by the within-written indenture, with their appurtenances, TO HOLD the same unto the said [*purchaser*], his executors, administrators, and assigns, henceforth during all the residue now unexpired of the term of —— years, granted by the said within-written indenture, and for all other the term of the said [*vendor*] therein, subject to the payment, observance, and performance of the rent and covenants in the said indenture reserved and contained, and on the lessee's part to be paid, observed, and

Parties.

Testatum.

Assignment.

Habendum.

SHORT ASSIGNMENT OF LEASEHOLDS.

performed; AND the said [*vendor*], for himself, his heirs, executors, and administrators, doth hereby covenant with the said [*purchaser*], his executors, administrators, and assigns, that, notwithstanding any act done or suffered by the said [*vendor*], he hath now power to assign the premises in manner aforesaid; and that, subject to the payment of the said rent, and to the observance and performance of the said covenants henceforth to be paid, observed, and performed, it shall be lawful for the said [*purchaser*], his executors, administrators, and assigns, peaceably and quietly to hold and enjoy the said premises hereby assigned, or intended so to be, during all the residue of the said term of —— years, without interruption or disturbance by the said [*vendor*], or any person claiming under him; *And that* free and clear of and from all charges and incumbrances whatsoever created or permitted by him the said [*vendor*], or occasioned by his act, neglect, or default; *And further*, that he the said [*vendor*], and every person lawfully claiming through or under him, will, at any time hereafter, on the request and at the costs of the said [*purchaser*], his executors, administrators, or assigns, assign and confirm to him and them the said premises for all the residue of the said term of —— years, in such manner as the said [*purchaser*], his executors, administrators or assigns, shall direct. AND the said [*purchaser*], for himself, his heirs, executors, and administrators, doth hereby covenant with the said [*vendor*], his executors and administrators, that he, the said [*purchaser*], his executors, administrators, or assigns, will, from time to time, faithfully perform and observe the lessee's covenants contained in the said indenture of lease (*a*), and will at all times hereafter effectually indemnify and save harmless the said [*lessor*], his heirs, executors, and administrators, from all losses, damages, and expenses in respect thereof. IN WITNESS, &c.

Covenants by vendor that he has power to assign.

For quiet enjoyment.

Free from incumbrances.

For further assurance.

Covenant by purchaser to perform covenants.

(*a*) As one of the covenants is for payment of rent, there need not be an express mention of this.

ASSIGNMENT *of the* EQUITY *of* REDEMPTION *of a Leasehold House to the* MORTGAGEE, *by* INDORSEMENT *on the* MORTGAGE-DEED (*a*).

ASSIGNMENT OF EQUITY OF REDEMPTION BY INDORSEMENT.

THIS INDENTURE, made the —— day of ——, in the year of our Lord 18—, BETWEEN the within-named [*vendor*] of the one part, and the within-named [*purchaser*] of the other part. WHEREAS the within-mentioned principal sum of 500*l.* is still owing to the said [*purchaser*], under or by virtue of the within-written indenture, with the sum of 25*l.* for interest thereon to the date hereof, making together the sum of 525*l.*; AND WHEREAS the said [*purchaser*] hath contracted with the said [*vendor*] for the absolute purchase of the within-mentioned piece or parcel of ground, messuage, or tenement, with the appurtenances, discharged from all equity of redemption, by reason of the proviso or agreement for that purpose contained in the within-written indenture, or otherwise howsoever, in consideration as well of the said sum of 525*l.*, now due and owing for principal and interest as aforesaid, as of the further sum of 315*l.*, paid by the said [*purchaser*] to the said [*vendor*], as hereinafter mentioned, which two several sums of 525*l.* and 315*l.* make together the sum of 840*l.* (*b*). NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the said sum of 525*l.*, so due and owing by or from the said [*vendor*] to the said [*purchaser*], for principal and interest as aforesaid, and of

Parties.

Recital of principal and interest due.

—Contract for purchase.

Testatum.

In consideration of money due on mortgage, and of further

(*a*) It is convenient to indorse the assignment of the equity of redemption on the mortgage-deed, because it prevents the possibility of any use being made of the covenant in the mortgage-deed for payment of the money, that deed being retained by the mortgagee as part of his evidence of title. If the mortgage-money were also secured by bond, the bond of course would be cancelled or delivered up.

Convenience of taking the assignment of equity of redemption by indorsement.

(*b*) This is the sum on which the *ad valorem* duty must be paid.

ASSIGNMENT OF EQUITY OF REDEMPTION BY INDORSEMENT.

sum paid, vendor assigns to purchaser.

and from which said sum of 525*l.*, and all claims and demands on account of the same (*c*), he the said [*purchaser*] doth hereby acquit, release, and discharge the said [*vendor*], his heirs, executors, administrators, and assigns; and also in consideration of the sum of 315*l.* of lawful money of Great Britain and Ireland, paid by the said [*purchaser*] to the said [*vendor*], immediately before the execution of these presents, the receipt of which last-mentioned sum the said [*vendor*] doth hereby acknowledge, and of and from the same doth hereby acquit, &c., (the said two several sums of 525*l.* and 315*l.* making together the said sum of 840*l.*, being in full for the absolute purchase of the said piece or parcel of ground, messuage, or tenement, with the appurtenances, for the residue now unexpired of the within-mentioned term of fifty-eight years, freed and discharged as aforesaid); He the said [*vendor*] *doth*, by these presents, grant, bargain, sell, assign, and confirm unto the said [*purchaser*], his executors, administrators, and assigns, ALL THAT the within-mentioned piece or parcel of ground, with the messuage or tenement thereon erected and built, and all other the premises within mentioned, and particularly described in the within in part recited indenture of lease, with their and every of their appurtenances, (except as therein mentioned); And all the estate, right, title, interest, trust, possession, equity and power of redemption, right, benefit, property, claim, and demand whatsoever, both at law and in equity, of him the said [*vendor*], of, in, and to the same premises, with their appurtenances, together with the said indenture of lease, and all benefit and advantage thereof, and of the lessor's covenants and agreements therein contained; TO HAVE AND TO HOLD the said piece or parcel of ground, messuage, or tene-

Parcels by reference to within indenture.

—And all the estate, &c.

Habendum to purchaser.

Mortgagor should be discharged from absolute covenants of mortgage.

(*c*) It is evident that the mortgagor ought to be discharged not only from the payment of the monies due on the mortgage, but from the absolute covenants for title, &c. entered into by him in the mortgage-deed; probably the words in the text, coupled with the substituted limited covenants contained in the present deed, would have that effect. If it be thought advisable to extend the discharge *expressly* to these, say—"and on account of all other claims and demands, by virtue of any covenant, clause, matter, or thing contained in the within-written indenture."

ment, and all and singular other the premises demised by the said indenture of lease, and by the within-written indenture, assigned or intended so to be, with the appurtenances, unto the said [*purchaser*], his executors, administrators, and assigns, henceforth during all the residue now unexpired of the said term of fifty-eight years, granted by the said indenture of lease, and for all other the estate, term, and interest of the said [*vendor*] therein, absolutely discharged from the proviso or agreement for redemption contained in the said indenture of assignment, and from all benefit and equity of redemption by reason thereof, or otherwise howsoever; But subject nevertheless to the payment of the rent, rates, taxes, and assessments, which, from and after the —— day of —— last past, are and ought to be paid, and to the observance and performance of the covenants, conditions, and agreements which henceforth, under or by virtue of the within-mentioned indenture of lease, are and ought to be observed and performed on the part of the said [*vendor*], his heirs, executors, administrators, and assigns; (*Covenants for title by the vendor*, ut ante, p. 98; Also *Covenant by the purchaser to pay the rent and perform the covenants of the lease*, ut ante, p. 98). In witness, &c.

ASSIGNMENT OF EQUITY OF REDEMPTION BY INDORSEMENT.

—Discharged from the proviso for redemption, but subject to the rents, &c. of lease.

RELEASE *in Fee of* Freehold Lands, *and* Covenant *to* surrender Copyhold Lands *by the* Heir-at-law *of the Surviving* Trustee *of a* Will, *in pursuance of a* Decree *of the* Court *of* Chancery *establishing such Will.*

UNDER DECREE IN CHANCERY.

THIS INDENTURE, made the —— day of ——, 18—, Between [*vendor*], of &c., of the one part; and [*purchaser*], of &c., of the other part. Whereas [*testator*], late of ——, deceased, being seised of or well entitled to the inheritance in fee-simple in possession of and in the close, piece, or parcel of land and hereditaments hereinafter described, and intended to be hereby released, And also of and in the

Parties.

Recital, that testator was seised in fee of the freeholds and

UNDER DECREE IN CHANCERY.

copyholds according to the custom of the manor; and by his will

copyhold or customary messuage or tenement, barn, lands, and hereditaments hereinafter mentioned and described, and covenanted to be surrendered according to the custom of the manor of [A.], in the county of [B.], in and by his last will and testament in writing, bearing date on or about the —— day of ——, which was in the year of our Lord ——, and executed and attested in such manner as is by law required for passing freehold estates, gave and devised all his freehold and copyhold estates unto [C.], [D.], and [E.], of ——, their heirs and assigns, To the use of his said wife for her life, And after her decease *Upon trust* to sell and dispose of the said freehold and copyhold estates, and pay and apply the money arising by sale thereof to such person and persons, and in such manner, as is thereinafter directed and concerns the same; And the said testator soon afterwards departed this life, without revoking or altering his said will, leaving his said wife [*wife*] him surviving; AND WHEREAS the said [C.] departed this life on the —— day of ——, leaving the said [D.] and [E.] him surviving; And the said [E.] departed this life on the —— day of ——, leaving the said [D.] him surviving; AND WHEREAS the said [D.] departed this life on the —— day of ——, leaving the said [*vendor*] his only son and heir-at-law, whereby the freehold and copyhold estates, so devised as aforesaid by the said in part recited will of the said [*testator*], have descended to and are now become vested in the said [*vendor*], upon the trusts in the said will of the said [*testator*] declared concerning the same. AND WHEREAS, at a special court baron holden for the said manor of ——, on or about the —— day of ——, which was in the year of our Lord ——, the said [*vendor*] was duly admitted tenant by the steward of the said manor, and seisin was granted to him by the rod, according to the custom of the said manor, of the messuage or tenement, barn, lands, and hereditaments hereinafter described and covenanted to be surrendered, with their appurtenances, *To hold* the same unto and to the use of the said [*vendor*], his heirs and assigns, for ever, Upon the trusts nevertheless expressed and declared in the said recited will of the said [*testator*], or such or so many of them as were then existing or capable of taking effect, at the will of the lord and according to the custom of the said manor, at the rents and services therefore due and

—devised all his real estate to trustees,

—to the use of his wife for life, and, at her decease, in trust, to sell the same, and apply the money as thereinafter directed.

—That trust estates had become vested in the heir of the surviving trustee.

Recital that, at at a special court held for the said manor, heir was admitted tenant,

—To hold to his use, &c., for ever, upon the trusts of the said will.

of right accustomed; AND WHEREAS, by a decree or decretal order of the High Court of Chancery, made by his Honour the Vice-Chancellor of England, on or about the —— day of ——, which was in the year of our Lord ——, in a cause wherein [R. S.], (as cousin and heir-at-law of the said [*testator*], deceased), [S. S.], (son of the said [R. S.]), and [*infants*], infants, by the said [R. S.], their grandfather and next friend, were plaintiffs, and [*several other persons*], and the said [*vendor*] (therein described as only son and heir-at-law of the said [*surviving trustee*],) were defendants, It was (amongst other things) ordered and directed, that it should be referred to Mr. ——, to inquire whether the plaintiff [R. S.], the elder, was the heir-at-law of the said [*testator*]; and in case the said Master should find that he was, (the said plaintiff by his counsel admitting the due execution of the will of the said [*testator*],) the Court declared that the same ought to be established, and the trusts thereof performed and carried into execution, and ordered and decreed the same accordingly; And it was ordered and decreed that the said [*testator's*] freehold and copyhold estates then remaining unsold should be sold either entire or in parcels, with the approbation of the said Master, to the best purchaser or purchasers that could be got for the same, to be allowed of by the said Master; whereupon all proper parties were to join and to produce before the said Master upon oath, all deeds and writings in their custody and power relating thereto, as the said Master should direct; And it was ordered that the money to arise by such sale should be paid into the Bank, with the privity of the Accountant-General of the said Court, to be there placed to the credit of the said cause; AND WHEREAS, soon after the making of the said recited decree, and before any further proceedings were had in the said cause, it being discovered that the said [R. S.] was not the sole heir-at-law of the [*testator*], but that [T. M.] and [L. O.] were co-heirs with him, being the descendants of [Ann R.] and [Mary B.], the [*testator's*] cousins, who were living at the time of his death, and against whom his will had been proved *per testes*, soon after his death, by the said [*widow*], his widow, the said plaintiffs filed a supplemental bill, and made the said [T. M.] and [L. O.] defendants to the said suit. AND WHEREAS, by another decree or decretal order of

UNDER DECREE IN CHANCERY.

Recital of decree of the Court of Chancery.

Direction that the testator's estates should be sold,

—And that all the deeds relating thereto should be produced;

—And the money arising from sale should be paid into the Bank of England to the credit of the cause.

—That R. S. was not the sole heir-at-law of the testator,

—but that T. M. and L. O. were co-heirs with him.

Supplemental bill.

Decree in sup-

UNDER DECREE IN CHANCERY. plemental cause.

the said Court of Chancery, made and pronounced on or about the —— day of ——, on the hearing of the said cause on the supplemental bill, the will of the said [*testator*], deceased, was declared to be well proved, and it was ordered and decreed that the trusts thereof should be performed and carried into execution; And it was further ordered that the said decree of the —— day of —— should be carried into execution, and the accounts thereby directed carried on and prosecuted between the then parties to the said suit, in like manner as the same were directed against the former parties.

Recital of Master's report of sale,

AND WHEREAS the said Master, by his report of the —— day of ——, certified (amongst other things) that, in pursuance of the said decree of the —— day of ——, he caused the sale of the freehold and copyhold estates of the said [*testator*] to be duly advertised in the London Gazette, in six distinct lots, according to the particular thereof set forth, and had on that day (being the peremptory day appointed for such sale) been attended by several bidders (*a*), and that the said [*purchaser*] had proposed before him to give the sum of 2500*l.* for the purchase of so much of the freehold close, piece, or parcel of land and hereditaments hereinafter mentioned and described, and intended to be hereby released, as is not comprised in the indenture of lease hereinafter mentioned to bear date the third day of August, 1792, (being that part of the estates of the said testator which was intitled or comprised in lot No. 1), and to give the sum of 1000*l.* for the purchase of so much of the said freehold close, piece, or parcel of land and hereditaments hereinafter mentioned and intended to be hereby released, as is comprised in the said indenture of lease of the third day of August, 1792, and of the copyhold or customary messuage or tenement, barn, lands, and hereditaments hereinafter described and covenanted to be surrendered, (being that part of the estates of the said [*testator*] which was intitled or comprised in lot No. 3), on the terms of having a good title made thereto respectively, free from incumbrances; which said sums of 2500*l.* and 1000*l.*, mak-

—and of the purchase by the present purchaser.

(*a*) By the 75th order (2 Russell, Append. 25), the Master may direct estates to be sold in the country, "at such place and by such person as he shall think fit." For practical information respecting sales under the authority of a Court of Equity, see Sugd. Vend. & Purch. 8th Ed. 49.

ing together the sum of 3500*l.*, being the most money that had been bidden before him for the premises comprised respectively in the said lots, No. 1 and No. 3, he the said Master did allow the said [*purchaser*] to be the best purchaser thereof, at those prices, upon the terms of his biddings: AND WHEREAS, by another order of the said Court of Chancery, made in the said cause the —— day of ——, It was ordered that the said report should be confirmed, unless the said plaintiffs and defendants, or their respective clerks in court, having notice thereof, should, within —— days after such notice, shew good cause to the contrary; which last-mentioned order was, by a subsequent order of the said Court, made in the said cause the —— day of ——, made absolute; And by another order of the said Court, made in the said cause the —— day of ——, It was (amongst other things), ordered that the said [*purchaser*] should, within —— weeks, pay the said two sums of 2500*l.* and 1000*l.*, making together the sum of 3500*l.* purchase-money, into the Bank of England, with the privity of the Accountant-General of the said Court, to be placed to the credit of the said cause; And that thereupon he should be let into the possession of the said premises so purchased by him, and receive the rents and profits thereof from the —— day of —— then last past; And that, on such payment by the said [*purchaser*], a proper conveyance of the same freehold and copyhold hereditaments and premises should be made and executed to him and his heirs, or as he should direct, such conveyance to be settled by the said Master in case the parties differed about the same (*b*). AND WHEREAS the said [*purchaser*] did, on the —— day of —— now last past, pursuant to the said last-recited order, pay the said two sums of 2500*l.* and 1000*l.*, making together the sum of 3500*l.*, into the Bank of England, in the name and with the privity of the said Accountant-General, as appears by the receipt of [*cashier*], one of the cashiers of the said Bank, thereto annexed, and therewith filed in the Register's Office of the said Court of Chancery. NOW THIS INDENTURE WITNESSETH, that, in pursuance of and in obedience

UNDER DECREE IN CHANCERY.

Confirmation of report.

—Purchaser to pay the purchase-money into the Bank of England.

—and thereupon to be let into possession, and have a conveyance.

Recital, that purchaser paid the purchase-money into the Bank of England.

Testatum.

(*b*) Here it will be perceived, that the Master is only to direct the form of the conveyance in case the parties differ, in which respect it varies from the forms, *ante*, Vol. 6, pp. 96, 444.

UNDER DECREE IN CHANCERY.

In consideration of payment of purchase-money into the Bank of England.

to the said recited decrees and subsequent orders, and in consideration of the sum of 2900*l.*, part of the said sum of 3500*l.* so as aforesaid paid by the said [*purchaser*] into the Bank of England, in the name and with the privity of the Accountant-General of the said Court of Chancery, and there placed to the credit of the said cause, in full for the absolute purchase of the inheritance in fee-simple of and in the said freehold close, piece, or parcel of land and hereditaments hereinbefore mentioned and intended to be hereby released, and of the said copyhold or customary messuage or tenement, barn, lands, and hereditaments hereinafter covenanted to be surrendered; which said sum of 2900*l.* being the apportioned price or consideration for the said freehold hereditaments, he the said [*vendor*] doth hereby acknowledge to be in full payment and discharge of the purchase of the same freehold hereditaments, and of and from the same doth release and discharge the said [*purchaser*], his heirs, executors, administrators, and assigns; And also in consideration of the sum of 10*s.* paid by the said [*purchaser*] to the said [*vendor*], at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, He the

Vendor releases to purchaser.

said [*vendor*] *hath* bargained, sold, and released, and by these presents *doth*, &c. unto the said [*purchaser*], (in his actual possession, &c.), and to his heirs and assigns, All &c. *(insert the parcels and general words)*, And all deeds, &c.

Habendum.

TO HAVE AND TO HOLD the said messuage or tenement, close, pieces or parcels of lands, hereditaments, and all and singular other the premises hereinbefore mentioned, and intended to be hereby released, with their appurtenances, unto the said [*purchaser*], his heirs and assigns, for ever, To

To the use of purchaser in fee.

THE ONLY PROPER USE and behoof of the said [*purchaser*], his heirs and assigns, for ever, And to, for, or upon no other use, trust, intent, or purpose whatsoever; subject nevertheless as to the said forty rods thereof hereinbefore particularly mentioned and described, being part and parcel of the said hereditaments and premises hereinbefore mentioned, and intended to be hereby released, to a lease thereof granted by indenture, bearing date on or about the third day of August, which was in the year of our Lord 1792, and made or expressed to be made between the said [*testator*] of the one part, and [*lessee*] of the other part, whereby the said [*testator*] demised the said forty rods of land, together with the copyhold

or customary messuage or tenement, barn, lands, and hereditaments (hereinafter covenanted to be surrendered) unto the said [L. T.], his executors, administrators, and assigns, from Christmas then next ensuing, for the term of ninety-nine years, under the yearly rent of 44*l.* AND THIS INDENTURE FURTHER WITNESSETH, that, in further pursuance of, and in obedience to, the said recited decrees and subsequent orders, and in consideration of the sum of 600*l.*, being the residue of the said sum of 3500*l.* so as aforesaid paid, &c. (*ut supra*, p. 106), being the apportioned price or consideration for the said copyhold hereditaments, He the said [*vendor*] doth hereby for himself, his heirs, executors, and administrators, covenant and agree, &c. (*to surrender copyholds*, ut ante, Vol. 7, p. 507; *and covenant by vendor that he has not incumbered*). IN WITNESS, &c.

UNDER DECREE IN CHANCERY.

Further *testatum.*

RELEASE *in* FEE *by a* MORTGAGEE *under a* POWER *of* SALE, *to Uses in favour of a* PURCHASER, *and also of a Person who* ADVANCES PART *of the* PURCHASE-MONEY, *which is secured by the Limitation of a* TERM *to the Lender by way of* MORTGAGE. (*Variation where Mortgage is in Fee*).

TO A PURCHASER AND HIS MORTGAGEE.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*vendor*], of &c., of the first part; [*purchaser*], of &c., of the second part; [*mortgagee*], of &c., of the third part; and [*dower trustee* (*a*)], of &c., of the fourth part; (*Recite mortgage-deed containing power of sale, and that default had been made in payment of the principal and interest monies which remained owing*). AND WHEREAS the said [*mortgagee*] hath, in pursuance of the power vested in him by the hereinbefore recited indenture of mortgage, contract-

Parties.

Recital of mortgage.

—Contract for sale.

(*a*) If the mortgage to the new mortgagee is in fee, the dower trustee should not be a party.

TO A PURCHASER AND HIS MORTGAGEE.

ed and agreed with the said [*purchaser*] for the absolute sale to him of the —— and other hereditaments hereinafter described, and hereby released, or intended so to be, (being part of the hereditaments comprised in the hereinbefore recited indenture of mortgage), for an estate of inheritance in fee-simple in possession, free from all incumbrances, at or for the price or sum of 1,000*l.*; AND WHEREAS the said [*mortgagee*], on the application of the said [*purchaser*], and in order to enable him to complete his said purchase, hath agreed to advance and lend to him the said [*purchaser*] the sum of 700*l.*, at interest, to be secured by a mortgage of the said —— and hereditaments, and to be payable at the time and in manner hereinafter mentioned.

—Of agreement to advance money on mortgage.

Testatum. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said recited agreement, and in consideration of the sum of 700*l.* of lawful money of Great Britain and Ireland, part of the said purchase-money or sum of 1,000*l.*, to the said [*vendor*] paid by the said [*mortgagee*], at or immediately before the execution of these presents (at the request of the said [*purchaser*], testified by his executing these presents), the receipt whereof the said [*vendor*] doth hereby acknowledge, and therefrom doth release and discharge the said [*mortgagee*], his heirs, executors, administrators, and assigns, and also the said [*purchaser*], his heirs, executors, administrators, and assigns, for ever, by these presents; And also, in further consideration of the sum of 300*l.* of like lawful money, being the remaining part of the said purchase-money or sum of 1,000*l.* to the said [*vendor*] paid by the said [*purchaser*] at or immediately before the execution of these presents, The receipt of which said sum of 300*l.* the said [*vendor*] doth hereby also acknowledge, and therefrom doth release and discharge the said [*purchaser*], his heirs, executors, administrators, and assigns, for ever, by these presents; He, the said [*vendor*], in pursuance of, and according to, his estate and interest under or by virtue of the said recited indentures of lease and release and mortgage, *hath* bargained, sold, released, and conveyed, and by these presents *doth* &c., unto the said [*purchaser*], (in his actual possession, &c.), and to his heirs and assigns, ALL THAT, &c. [*parcels*], together with all ways, &c. And the reversion, &c. And all the estate, &c. And all deeds,

In consideration of part of purchase money paid by the mortgagee, and the residue by the purchaser,

Vendor conveys the premises.

TO A PURCHASER AND HIS MORTGAGEE.

&c., except the recited indentures of lease and release, or mortgage, which are hereinafter covenanted to be produced, To HAVE AND TO HOLD the said ——, and all and singular other the premises hereinbefore described, and hereby released, or intended so to be, with their appurtenances, unto the said [*mortgagee*] (*b*) and his heirs, for ever, (*c*) *Nevertheless*, To THE USE of the said [*mortgagee*], his executors, administrators, and assigns, from the day next before the day of the date hereof, for and during and unto the full end and term of two thousand years thence next ensuing and fully to be complete and ended, without impeachment of or for any manner of waste, subject to the proviso hereinafter contained for making void the said term; and from and after the expiration or other sooner determination of the said term of two thousand years, and in the meantime subject thereto, *(to uses to prevent dower in favour of the purchaser*, ut ante, Vol. 7, p. 461); AND the said [*vendor*] doth hereby for himself, his heirs, executors, and administrators, covenant and agree with the said [*mortgagee*] and his heirs, That he the said [*vendor*] hath not at any time heretofore exercised the power of selling, given or reserved by the said recited indenture of release and mortgage, so far as the same relates to or concerns the said hereditaments hereinbefore mentioned, and expressed to be hereby released, or any part thereof respectively; And that he hath not at any time heretofore made, done, committed, or suffered, any act, matter, or thing whatsoever, by means whereof the same hereditaments and premises, or any part thereof respectively, are or is conveyed, assured, impeached, charged, or incumbered; *(And also to produce the hereinbefore recited*

Habendum.

To the use of of the mortgagee for two thousand years; subject thereto

To uses to prevent dower.

Covenant by vendor that power of selling is unexercised,

—And that he has not incumbered.

(*b*) The reason for making the mortgagee the releasee to uses in this instance is, that it renders him the grantee of the title-deeds, which of course are to be placed in his possession, but to which as a *termor* he would not be entitled except by express grant; and it is not clear that such grant would enure to the use of the *cestui que use*. *Vide ante*, Vol. 5, p. 407, Vol. 7, p. 459. At all events it is better to avoid the question.

Reason for making the conveyance to the mortgagee.

(*c*) If the mortgage is to be in fee, say—

"To THE USE of the said [*mortgagee*], his heirs and assigns, for ever, subject nevertheless to the proviso for redemption hereinafter contained."

TO A PURCHASER AND HIS MORTGAGEE.

indentures of lease and release, or mortgage, to any person or persons entitled to or interested in the premises, under the limitations hereinbefore contained); PROVIDED ALWAYS, and it is hereby agreed and declared, that in case the said [*purchaser*], his heirs, executors, administrators, or assigns, shall and do pay, or cause to be paid, unto the said [*mortgagee*], his executors, administrators, or assigns, at or in the common dining hall of Lincoln's Inn, in the county of Middlesex, between the hours of ten and twelve of the clock in the forenoon of the —— day of —— now next ensuing, the sum of 700*l.* of lawful money of Great Britain and Ireland, together with interest for the same in the meantime, after the rate of five pounds for every hundred pounds, by the year, free from taxes, and without any other deduction whatsoever, then, and in such case, and immediately after such payment so made, the said (*d*) term of two thousand years hereby limited in use to the said [*mortgagee*], his executors, administrators, and assigns, shall cease, determine, and be utterly void, any thing hereinbefore contained to the contrary thereof notwithstanding: AND the said [*purchaser*] doth hereby for himself, his heirs, executors, and administrators, covenant and agree with the said [*mortgagee*], his (*e*) executors, administrators, and assigns, in manner following, that is to say, That he the said [*purchaser*], his heirs, executors, administrators, or assigns, shall and will pay or cause to be paid unto the said [*mortgagee*], his executors, administrators, or assigns, the said sum of 700*l.* of lawful money of Great Britain and Ireland, with interest for

Proviso for cesser of term, on payment of principal and interest monies.

Covenant by mortgagor for payment of mortgage-money.

(*d*) If the mortgage is in fee, substitute the following:—

Variation where mortgage is in fee.

"[*mortgagee*], his heirs or assigns, shall and will, on the request, and at the costs and charges of the said [*purchaser*], his heirs or assigns, convey and assure the said —— and premises, unto and to the use of the said [*purchaser*], his heirs and assigns, or in such other manner as he or they shall direct, free from all incumbrances created by the said [*mortgagee*], his heirs, executors, administrators, or assigns, in the meantime." *(Add trusts for sale in default of payment, if so intended).*

(*e*) If the mortgage is in fee, say "heirs, executors," &c. The covenants will be construed *referendo singula singulis.*

TO A PURCHASER AND HIS MORTGAGEE.

the same after the rate aforesaid, free from taxes, and without any other deduction except as aforesaid, at the place and on the days and times, and in manner hereinbefore appointed for payment thereof, according to the form and effect of the aforesaid proviso, and the true intent and meaning of these presents; *And that* (*f*) the said [*vendor*] now hath in himself good right, full power, and lawful and absolute authority, to bargain, sell, release, or otherwise assure the said —— and hereditaments hereinbefore described and hereby released, or intended so to be, (*g*) to the use of the said [*mortgagee*], his executors, administrators, and assigns, for the said term of two thousand years hereinbefore limited to him and them in manner aforesaid, according to the trueintent and meaning of these presents; *And that*, after default shall have been made in payment of the said sum of 700*l.*, or the interest thereon, or of any part thereof respectively, at or upon the day or time hereinbefore appointed for payment thereof respectively, contrary to the

—That vendor has right to convey.

—For quiet enjoyment.

(*f*) It is usual, in cases such as the present, for the purchaser not to enter into covenants as to the vendor's being seised and having power to convey, but merely to covenant for the quiet enjoyment and further assurance. There seems, however, to be no ground for such a departure from the ordinary rule; for the fact, that the property has never vested in the purchaser antecedently to the creation of the mortgage, even if it excluded the possibility of its being affected by his acts, (which it does not, as the equitable interest acquired by him under a contract might have been affected by crown specialty debts), affords no reason why he (the purchaser) should not covenant for the title in the same manner as he would have done if the property had previously belonged to him, since a mortgagor's covenants extend not to his own acts only, but to the acts of all persons whomsoever; and in this case, equally with others, it is proper that the mortgagee should be enabled to bring an action immediately on the discovery of a defect of title, although the time appointed for the payment of the money may not have arrived. The circumstance, that in this instance the vendor, being a trustee only, has entered into no covenants for title, is immaterial. The purchaser's covenants with the mortgagee would be the same if there were the usual limited or even absolute covenants on the part of the vendor.

Suggestion as to the purchaser's covenant for the title.

(*g*) If the mortgage is in fee, say—

"unto and to the use of the said [*mortgagee*], his heirs and assigns for ever, according," &c.

TO A PURCHASER AND HIS MORTGAGEE.

true intent and meaning of these presents, it shall be lawful for the said [*mortgagee*], his (*h*) executors, administrators, and assigns, from time to time, and at all times thereafter, during the then residue of the said term of two thousand years thereby limited to the use of the said [*mortgagee*] as aforesaid, peaceably and quietly to enter into and upon, and to hold and enjoy, the said —— and other hereditaments hereby released, or intended so to be, with their appurtenances, and to receive and take the rents and profits thereof for his and their own use, without any interruption or disturbance whatsoever from or by the said [*purchaser*], his heirs or assigns, or any other person or persons whomsoever; *And that* free and clear, and freely, clearly, and absolutely exonerated and discharged, or otherwise by the said [*purchaser*], his heirs, executors, or administrators, well and sufficiently saved harmless and kept indemnified of, from, and against all and all manner of former and other estates, titles, liens, charges, and incumbrances whatsoever; *And moreover*, that he the said [*purchaser*], and his heirs, and every other person lawfully claiming any estate, right, title, or interest in, to, or out of the said —— and other hereditaments hereby released, or intended so to be, or any part or parts thereof, shall and will, from time to time, and at all times hereafter, at the request of the said [*mortgagee*], his executors, administrators, or assigns, but at the costs and charges of the said [*purchaser*], his heirs, executors, administrators, or assigns, make, do, acknowledge, levy, suffer, and execute, or cause to be made, done, acknowledged, levied, suffered, and executed, all such further acts, deeds, and things, conveyances and assurances whatsoever, for the more effectually granting, conveying, and assuring the said —— and other hereditaments (*i*) hereinbefore limited to the use of the said [*mort-*

—Free from incumbrances.

—For further assurance.

(*h*) If the mortgage is in fee, say—

Variation where mortgage is in fee.

" heirs and assigns, from time to time, and at all times for ever thereafter, peaceably," &c.

(*i*) If the mortgage is in fee, say—

" unto and to the use of the said [*mortgagee*], his heirs and

TO A PURCHASER AND HIS MORTGAGEE.

gagee], his executors, administrators, or assigns, for the said term of two thousand years as aforesaid, with their appurtenances, unto the said [*mortgagee*], his executors, administrators, and assigns, for all the residue which shall be then unexpired of the said term of two thousand years therein, in manner aforesaid, according to the true intent and meaning of these presents, as by the said [*mortgagee*], his executors, administrators, or assigns, or his or their counsel in the law, shall be reasonably advised, or devised and required. AND *it is hereby agreed and declared* between and by the said [*purchaser*] and [*mortgagee*], that in the meantime, and until default shall happen to be made in payment of the said sum of 700*l.*, or the interest thereof, or of some part thereof respectively, contrary to the true intent and meaning of the aforesaid proviso and covenant for payment of the same, it shall be lawful for the said [*purchaser*], his heirs and assigns, to hold, possess, and enjoy the said —— and other hereditaments hereby released, or intended so to be, and to receive and take the rents and profits thereof for his and their own use and benefit, without any interruption or disturbance whatsoever from or by the said [*mortgagee*], his (*k*) executors, administrators, or assigns, or from or by any other person or persons lawfully claiming through or under him or them. IN WITNESS, &c.

Declaration that mortgagors shall hold till default in payment.

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assigns for ever, in manner aforesaid, according" &c.

If the mortgagee is invested with a power of sale, the covenant for further assurance will be varied, *ut ante*, Vol. 5, p. 264.

(*k*) If the mortgage is in fee, say—" heirs, executors," &c.

SURRENDER OF LEASE FOR YEARS.

SURRENDER (*a*) *of a* LEASE *for the* RESIDUE *of a* TERM *to the* REVERSIONER, *in Consideration of a Sum of Money, and a Release of Claims for Rent, &c. (Short Form.)*

Parties.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*vendor*], of &c., of the one part; and [*purchas-*

Definition of a surrender.

(*a*) Surrender is a yielding up of an estate for life or years to him who hath the immediate estate in reversion or remainder, wherein the estate for life or years may drown by mutual agreement. Co. Litt. 337. b.; Perk. s. 584; 2 Vent. 206; 4 Bac. Ab. 209.

Surrenders do not require a *deed.*

Before the statute of frauds, surrenders might have been made by word of mouth, and now they may be made by writing under hand only; *Farmer* d. *Earl* v. *Rogers*, 2 Wils. 26; unless the subject be an incorporeal hereditament, as an advowson, tithes, or an estate in reversion or remainder, in which case the surrender must be *by deed.*

But where A., tenant for life in possession, and B., tenant for life in remainder, joined in a surrender to the reversioner in fee without deed, this was ruled to be a good surrender of the estate for life in remainder, for it operated first as a surrender of the life estate in possession to the tenant for life in remainder, and then as a surrender of the estate of the latter (which had become, by the surrender of the prior estate for life, an estate in possession) to the reversioner in fee. 2 Roll. Ab. 498, (K), pl. 2. The distinctions, however, between subjects which may be conveyed by deed and those which may be conveyed without deed, respecting which very many positions are to be found in the early books, have lost much of their practical importance since the statute of frauds has put an end to oral conveyances, and the practice has become universally prevalent, of making all conveyances, without distinction, by deed, a practice which has probably been induced by the frequency of covenants for title being associated with conveyances of estates.

Surrender of freehold effectual without livery of seisin

Estates of freehold will pass by surrender without livery of seisin or any equivalent ceremony; 2 Roll. Ab. 498, (K), pl. 3; and a surrender is also complete without entry, on account of the privity of estate subsisting between the surrenderor and surrenderee.

er], of &c., of the other part: WHEREAS, by an indenture of lease, bearing date on or about the —— day of ——, made

Recital of lease.

But where a man is seised *jure uxoris* of an estate of freehold, an effectual surrender can only be made by means of a fine. Perk. s. 613. With respect to his wife's terms of years, of course he has the same power of disposition over them by surrender, as by any other mode of assurance. Shepp. Touchst. 303.

Surrender of wife's freehold must be by fine.

The surrender must be of the whole estate; and, therefore, if a tenant for life make a lease to him in reversion or remainder, for the term of the life of the latter, this shall not enure as a surrender, because it does not comprise the whole estate. Shepp. Touchst. 308. So, if a tenant for life grant the lands to the reversioner or remainder-man for one hundred years, if he (the grantor) shall so long live, the grant operates as a lease and not as a surrender. See Alderman *Garraway's* case, cit. Hard. 417. And this is often a convenient mode of limitation, where the tenant for life sells his estate to the person entitled in reversion or remainder, and it is wished not to merge the estate for life, and yet to vest, so far as may be, the legal as well as equitable title in the purchaser. The freehold, subject to the determinable term, remains in the vendor, who declares that he holds it in trust for the purchaser, or it is conveyed to another person in trust for him. And if it were wished to give the purchaser not only the legal title for a term, but the legal *freehold* also, an estate during the joint lives of the vendor and some other person might be carved out of the estate for life of the vendor, and vested in the purchaser, which would be prevented, by the *mesne* reversionary freehold remaining in the vendor, from merging in the purchaser's ulterior reversion or remainder; and then, in order to vest in the purchaser the property for the possible residue of the life of the vendor, after the determination of the joint estate, a term for one hundred years, determinable with the life of the vendor, to take effect on the determination of the joint estate, might be limited to him (the purchaser).

Surrender must be of the whole estate.

The words "surrender" and "yield up," though the most proper words of conveyance, are not essential to the operation of a surrender; but any language which denotes the intention of the parties, will be sufficient. See *Sleigh* v. *Bateman*, Cro. El. 487; 2 Roll. Ab. 497, (H), pl. 1. Thus, where a tenant for life told the reversioner *that his will was that he entered*, it was held to be a good surrender. See *Penruddock* and *Newman's* case, 1 Leon. 280; 2 Ib. 50; 2 Roll. Ab. 498, (H), pl. 2. This was before the statute of frauds, but the principle equally applies to surrenders in writing at the present day.

Word "surrender" not essential to the instrument.

So, in the case of *Farmer* d. *Earl* v. *Rogers*, 2 Wilson, 26, where A. B., by deed indented, mortgaged lands to C. D. for five hundred years,

SURRENDER OF LEASE FOR YEARS.

between the said [*purchaser*], of the one part, and the said [*vendor*], of the other part; the said [*purchaser*] did de-

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with a proviso for *cesser* on payment of 500*l.* and interest upon a certain day. This mortgage was set up as a defence to an action of ejectment, when it appeared to contain the following indorsement: "Received this —— day of March, 1738, (being after the day limited by the proviso), of A. B., so much money for all principal money and interest till this day; *and I do release the said A. B., and discharge the within mortgaged premises from the term of five hundred years.*" Signed by C. D. the mortgagee. The indorsement was held to be a sufficient surrender of the term, the Court observing that the words "release and discharge the term of five hundred years," were much stronger than words which in many cases had amounted to a surrender, *ut res magis valeat quam pereat.*

Again, where a lessee agreed that the lessor should have the house on the terms mentioned in the lease, it was held that this amounted to a surrender. *Smith* v. *Mapleback*, 1 D. & E. 441.

Surrender may be made upon condition.

A surrender, like any other conveyance, may be made upon condition, so that when the condition is broken, the deed fails of effect, and the estate remains in the surrenderor. Perk. s. 624; 2 Roll. Ab. 498, (K), pl. 1; 4 Bac. Ab. 214.

Assent of surrenderee, whether requisite to the operation of the instrument.

In the case of *Thompson* v. *Leach*, 2 Vent. 198; 3 Lev. 284; Show. P. C. 150, *S. C.*, it was much debated whether a surrender had any operation before the assent of the surrenderee. Lands had been devised to A. for life, remainder to the first and other sons of A. in tail male, remainder to B. in tail male; A., *before the birth of a son*, surrendered his life estate to B., who, *subsequently* to the birth of the son, assented to the surrender. There being no vested remainder interposed between the estate for life of A. and the contingent remainder to the unborn sons of A., to preserve the latter, the effect of the surrender, if it took effect immediately on its execution, was to destroy that remainder; but it was contended, that, the assent of the surrenderee not having been given until after the birth of a son, the contingent remainder vested before the surrender took effect, and therefore the estate of the first son was not defeated; but *Ventris*, in opposition to his brethren on the bench, contended that the estate vested in B. "I am of opinion," said the learned Judge, "that, upon the making of the deed of surrender, the freehold and estate of A. did immediately vest in B. before he had notice, or gave any express consent to it; and so it was a surrender before the son was born; and then the contingent remainder could never vest in him, there being no particular estate to support it. A surrender is a particular sort of conveyance that works by the common law. And it has been agreed, and I think I can make it plainly appear, that conveyances at the com-

mise unto the said [*vendor*], ALL THAT *(describe parcels)*, with the appurtenances thereto belonging, *To hold* the same

SURRENDER OF LEASE FOR YEARS.

mon law do immediately, (upon the execution of them on the grantor's part), divest the estate out of him, and put it in the party to whom such conveyance is made, though in his absence or without his notice, till some disagreement to such estate appears. I speak of conveyances at the common law, for I shall say nothing of conveyances that work upon the statute of uses, or of conveyances by custom—as surrenders of copyholds, or the like—as being guided by the particular penning of statutes, and by custom and usage, and matters altogether foreign to the case in question. In conveyances that are by the common law, sometimes a deed is sufficient, (and in surrenders, sometimes words, without a deed), without further circumstance or ceremony; and sometimes a further act is requisite to give them effect—as livery of seisin, attornment, and, sometimes, entry of the party, as in case of exchanges; and as well in those conveyances that require a deed only, as those which require some further act to perfect them, so soon as they are executed on the grantor's part, they immediately pass the estate. In case of a deed of feoffment to divers persons, and livery made to one feoffee, in the absence of the rest, the estate vests in them all till dissent. 2 Leon. 23, *Mutton's* case. And so, 223, an estate made to a *feme covert* by livery vests in her before any agreement of the husband. Co. 1 Inst. 356. a. So, a grant of a reversion after attornment of the lessee, passeth the freehold by the deed. Co. 1 Inst. 49. a.; Litt. sect. 66. In case of a lease, the lessee hath right immediately to have the tenements by force of the lease. So, in the case of limitation of remainders and of devises, (which, though a conveyance introduced by the statute, yet operates according to the common law), the freehold passeth to the devisee before notice or assent. I do not cite authorities, which are plentiful enough in these matters, because they that have argued for the plaintiff have in a manner agreed, that in conveyances at the common law, generally, the estate passeth to the party, till he divests it by some disagreement." Judgment, however, was given in opposition to the argument of the learned Judge, and which judgment was affirmed in the Court of King's Bench; but the case was afterwards brought, by writ of error, into the House of Lords, where the judgment was reversed, "upon the reasons," it is said, "of the aforesaid argument."

In order to ascertain whether the estate to be conveyed will pass by surrender, recourse must be had to the law of merger*, which indeed has been not unaptly denominated a surrender in law; for it may be laid down as a general rule, that wherever the estate of the surrenderee, devolving by any means to the surrenderor, would, under the doc-

Analogy between surrender and merger.

* Which see *ante*, p. 1 *et seq.*

SURRENDER OF LEASE FOR YEARS.

unto the said [*vendor*], his executors, administrators, and assigns, for the term of twenty-one years, commencing from

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trine of merger, extinguish or absorb the estate of the latter, the conveyance will operate as a surrender, otherwise not. Thus, where an estate stood limited to A. for life, with remainder to B. for life, with remainder to C. in fee, and A. surrendered to C., it was held that the deed could not operate as a surrender, by reason of the mesne estate of B. *Doe* d. *Wolley* v. *Pickard*, 1 Wms's. Saund, 236, stated *ante*, Vol. 1, p. 455. One instance, indeed, may be adduced, in which surrender has a more extensive effect than merger. Thus, if A., tenant for life, with remainder to B. and C. as joint tenants in fee, surrenders to B. alone, this will enure to both joint tenants; Shepp. Touchst. 308*; Co. Litt. 192. a.; whereas, if A. were tenant *pur auter vie*, with reversion or remainder in fee to B. and C., and the estate for life of A. were to devolve by descent to B., (as it might do if it were a descendible freehold), merger would be produced *quoad* the share of B., *i. e.* one moiety only, and B. would be tenant for life of the other moiety.

As to a surrender to one joint tenant enuring to the benefit of all.

But although a joint tenant in reversion or remainder, being seised *per mie* and *per tout*, has a capacity in point of estate to receive a surrender on behalf of himself and his co-tenants, yet it does not follow that every conveyance to one such joint tenant will enure to the use of all. Thus, if a tenant for life grants his estate for life to one of several joint tenants in remainder or reversion, this will operate as a surrender only to the extent of the share of that one, and he will hold the other share or shares for the life of the grantor. See Shepp. Touchst. 84. In both these cases, the intention is the governing principle of construction. If it be the clear intention that the estate shall be extinguished, or, in other words, that the deed shall operate as a surrender, it is necessary, in order to effectuate such intention, that it should enure to the use of all the joint tenants; and this, therefore, is adjudged to be its effect: but unless such an intention be manifest, it will operate for the benefit of the grantee, and of him only.

A practical hint, suggested by the analogy which has been noticed to exist between the law of merger and the law governing surrenders, is, that, where it is doubtful whether the estate of the proposed surrenderor would merge in the estate of the proposed surrenderee, the deed should be so

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* But see Shepp. Touchst. 303, where the same author has, with singular inconsistency, treated it as essential to a surrender, that the surrenderee "be solely seised of the estate in remainder or reversion, *and not in joint tenancy*;" and this is often cited without remark. See Woodfall's *Landlord & Tenant*, by Harrison, 241. Co. Litt. 337, there quoted, seems not to apply.

the —— day of —— then last, at the yearly rent of £——, and subject to the observance and performance of certain

SURRENDER OF LEASE FOR YEARS.

framed as to pass the estate, whether it took effect as a surrender or not. The case of several estates *pur auter vie*, and of several terms of years, the one being a remainder to the other, will occur to the learned reader as being in the predicament in question. *Vide ante*, p. 3.

Rule where a deed fails of effect as a surrender.

And here it should be observed, that a deed intended to operate as a surrender, but which, from the circumstance of there being an intervening estate, could not take effect as a surrender, would generally pass the subject matter by way of grant, unless some additional ceremony, as livery of seisin or enrolment, were requisite to give effect to it as any other assurance, which was not essential to its operation as a surrender. This happens where the estate to be surrendered is a freehold *in possession*, though it will be remembered that an estate from year to year in a tenant at rack-rent makes the freehold a reversion, which would therefore be grantable by deed alone as an incorporeal hereditament. *Vide ante*, Vol. 5, p. 255. The doctrine that a deed intended as a surrender will take effect as a grant, was recognised in Sheppard's Touchstone, p. 308, where it is laid down that "if there be lessee for years, the remainder for life or years, the remainder in fee, and the lessee for years in possession doth surrender and grant all his estate to him in remainder in fee, howsoever this deed cannot enure as a surrender (by reason of the intervening estate), yet it shall enure as a good grant of the estate of the lessee for years unto him in remainder in fee." The learned author supposes other words in addition to those which are properly applicable to a surrender to be used; and though it may be thought that the requisition of additional words ill accords with the liberal doctrines of modern times in regard to the construction of deeds, yet it will suggest to the cautious practitioner, ever anxious to avoid the slightest pretext for disputation, the expediency of not confining the operative words to those proper for a surrender. And where there is any reason to suspect the existence of an intervening estate, which would prevent the deed from operating as a surrender, it might be advisable to omit the usual words denoting the intent of the parties to be that the term should be extinguished, in order to take away the least plausibility for the argument that the purpose of extinguishment was so paramount and prevalent an object of the parties, that the failure of such purpose totally deprived the deed of its operation.

As to the surrender of an *interesse termini*.

As an *interesse termini* cannot merge, so it is clear it cannot be the subject of an express surrender. Thus Lord C. B. *Gilbert*, in his excellent chapter on Leases, 4 Bac. Ab. 216, lays it down that—"a lessee for years to begin presently, cannot, till entry or waiver of the possession by

SURRENDER OF LEASE FOR YEARS.

conditions and covenants on the part of the said [*vendor*], his executors, administrators, and assigns, to be observed and

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the lessor, merge or drown the same by any express surrender; because, till entry there is no reversion wherein the possession may drown: but if the lessee had entered and assigned his estate to another, such assignee before entry might have surrendered his estate to the lessor; because, by the entry of the lessee the possession was severed and divided from the reversion, which possession, being by the assignment transferred to the assignee, may without any other entry be surrendered, and drown in the reversion."

But, though an *interesse termini*, from its not possessing the qualities or properties of an *estate*, cannot be the subject of merger or surrender, yet it may be extinguished by the virtual or implied surrender which is produced by the acceptance of a new lease. Thus, if a lease be granted to commence at Michaelmas next, if such lessee before Michaelmas take a new lease for years, either to begin presently or at Michaelmas, this is a surrender in law of the first lease presently, since such lessee having contracted for a new interest inconsistent with the first, his acceptance of such new interest waives and dissolves the first. 4 Bac. Ab. 216. The reason assigned for this distinction is, *fortior est dispositio legis quam hominis*. See Shepp. Touchst. 302.

Enactment of statute of frauds, requiring surrenders to be in writing.

Surrenders by operation of law are excepted out of the statute of frauds, 29 Car. 2, c. 3, s. 3, which provides, that no leases, estates, or interests, either of freehold or terms of years, shall be surrendered, unless it be by deed or note in writing, signed by the party so surrendering, or his agent lawfully authorized by writing, *or by act and operation of law.*

Exception as to surrenders by operation of law.

This exception has been held to apply to the virtual surrender which is effected by a lessee taking a new lease or interest inconsistent with the existing lease. See *Magennis* v. *Maccullogh*, Gilb. Eq. Rep. 236; Co. Litt. 338. a. Thus, it is clear, that if a lessee for thirty years takes a new lease for three years, this is a surrender and determination of the old term of thirty years, because thereby the lessee admits the lessor's power to make such lease, which, if the first should stand in the way, would be void. Perkins, s. 617. This doctrine was recognised in the case of *Hughes* v. *Robotham*, Cro. El. 302, where it is laid down, that "if a man be lessee for twenty years, and the reversion is granted for one year to another, who grants it to the lessee for twenty years, this is a surrender of the first lease for twenty years, *and is as if he had taken a new lease for a year of his lessor.*" The inconsistency of the new with the old lease is the ground of the surrender; and to this test every case must be brought, in order to ascertain whether a surrender is produced. The acceptance of any interest or right in or incident to the land, if in-

performed; AND WHEREAS the said [*vendor*] is now indebted unto the said [*purchaser*] in a considerable sum of —Of certain claims made by the purchaser on the vendor.

consistent with the lease, (and inconsistent of course it must be if the former lease comprise such interest or right), will produce an implied surrender. 2 Roll. Ab. 496, (F).

Acceptance of a void lease, whether an implied surrender.

And even where the new lease was void for a defective execution, being a lease for life to begin on a future day, yet it was held to be a surrender of a prior lease for life, "because the lessee admitted that the lessor had power to make the new lease for life, which he could not have unless the former was surrendered." *Mellow* v. *May*, Moore, 636, pl. 876; see also 4 Bac. Ab. 214. But, in the case of *Watt* v. *Maidwell*, Hutton, 104, it was held, that no implied surrender took place where the second lease was void for want of the lessor's power to make it, he having in the interval between the two leases demised the lands to a third person, so that the effect of the first lease being surrendered, would have been to let in the lease of such third person. So, in the case of *Lloyd* v. *Gregory*, Sir W. Jones, 405; *S. C.* Cro. Car. 501, it was held, that an infant's surrender by the acceptance of a new lease was void, where the new lease, being granted without any increase of the term or decrease of the rent, and therefore not apparently for the advantage of the infant, was void also. So, it has been repeatedly decided, that the acceptance of a lease granted under a power, but which was void for non-compliance with the terms of such power, was no surrender of a valid subsisting lease; for it is said, that "if a surrender is intended for a particular purpose, and that purpose, the only motive for it, fails, the surrender ought to fail." *Davison* d. *Bromley* v. *Stanley*, 4 Burr. 2210. See also *Zouch* v. *Parsons*, 3 Burr. 1807; *Wilson* v. *Sewell*, 4 Burr. 1980; *Roe* d. Earl *Berkley* v. Archbishop of *York*, 6 East, 86. And this seems to be the sensible rule on the subject. It is probable that the doctrine of the case of *Mellow* v. *May* will not be carried beyond the particular circumstances of that case.

Effect of the acceptance of a new lease from a conditional grantee of the reversion.

But if a lessee accepts a new lease from the owner for the time being of the reversion, whose estate is *conditional*, and subsequently fails, so that the new lease, which was derived out of it, of course fails also, the first lease is not revived. *Brewster* v. *Parrot*, Cro. El. 264.

Where new lease comprises part only.

Where the new lease comprises part only of the lands demised by the old one, the surrender will be confined to that part only. *Fish* and *Campion*, 2 Roll. Ab. 498, (M). And though a contract for years cannot be so divided or severed, as to be avoided for part of the years, and to subsist for the residue, either by act of the party or act in law, yet the land itself may be divided or severed, and he may surrender one or two acres, either expressly or by act in law, and still the lease for the residue stand good and

SURRENDER OF LEASE FOR YEARS.

money for arrears of rent, And the said [*purchaser*] also claims from the said [*vendor*] a pecuniary compensation in respect of the breach of certain covenants contained in the hereinbefore-recited indenture of lease, which the said [*purchaser*] alleges to have been broken or infringed by the said [*vendor*]; AND WHEREAS it has been agreed between the said [*vendor*] and [*purchaser*], that, in consideration of the said [*purchaser*] releasing to the said [*vendor*] all claims and demands in respect of the said arrears of rent and breach of covenants, and otherwise, by reason of the hereinbefore recited indenture of lease, and also paying to the said [*vendor*] the sum of 50*l.*, he the said [*vendor*] shall surrender to the said [*purchaser*] the residue now unexpired of the said term of twenty-one years, granted by the hereinbefore recited indenture of lease. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of 50*l.* of lawful money of Great Britain and Ireland, paid by the said [*purchaser*] to the said [*vendor*], at or immediately before the execution of these presents (*b*), the receipt &c.; And also in consideration of the release hereinafter contained on the part of the said [*purchaser*],

Contract for surrender.

Testatum.

Vendor, in consideration, &c., surrenders to purchaser.

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untouched; because here the contract for the residue remains entire, whereas, in the other case, the contract for the whole would be divided, which the law will not allow. 4 Bac. Ab. 217.

Construction making new lease consist with old.

And the inconsistency, which is the ground of the implied surrender in these cases, will if possible be avoided altogether, such a construction being given to the new lease as will make it consist with the old. Thus, if a lessee accepts a rent out of land, without any time of its commencement being stated, this shall not be a surrender, for it does not appear but that it is intended to issue out of the reversion after the expiration of the lease. *Sible* and *Serle's* case, 2 Roll. Ab. 496, pl. 15; see also other cases cit. Bac. Ab. 217.

Surrender immediate, though new lease is to commence *in futuro.*

But if the new lease is to commence at any future specified time during the continuance of the first, it will be an implied surrender of the latter, and that immediately, for the surrender is not suspended until the time of the commencement of the new lease, but takes place *instanter*, as it arises from inconsistency of contract, and is not referable to the law of merger. See *Ive's* case, 5 Rep. 11 b; *Maton* v. *Hutchins*, 2 Roll. Ab. 496, (F), pl. 12; Perk. p. 118, n. by Greening.

(*b*) The *ad valorem* duty is payable on the pecuniary consideration only.

he the said [*vendor*] *Doth* by these presents assign, surrender, and yield up unto the said [*purchaser*], his heirs and assigns, All and singular the —— and premises comprised in and demised by the hereinbefore recited indenture of lease; And all the estate, right, title, interest, term of years now to come and unexpired, benefit, claim, and demand whatsoever, either at law or in equity, or otherwise howsoever, of him the said [*vendor*], in and to the said premises; *To the intent* that the residue now unexpired of the said term of twenty-one years, granted by the hereinbefore recited indenture of lease, And all other the estate, term, and interest of the said [*vendor*] in the said —— and premises thereby demised, under or by virtue of the same indenture, may be merged and extinguished in the freehold and inheritance of the same premises; and to or for no other intent or purpose whatsoever; And the said [*vendor*], for himself, his heirs, executors, and administrators, doth hereby covenant with the said [*purchaser*], his heirs and assigns, that, notwithstanding any act or deed whatsoever done or permitted by the said [*vendor*], he the said [*vendor*] now hath in himself good right and absolute authority to surrender the said premises unto the said [*purchaser*], his heirs and assigns, in manner aforesaid, according to the true intent and meaning of these presents; *And also*, that it shall be lawful for the said [*purchaser*], his heirs and assigns, to hold and enjoy the said premises for all the residue now unexpired of the said term of twenty-one years, without any interruption or disturbance whatsoever from or by the said [*vendor*], his executors or administrators, or any person or persons claiming through or under him or them; *And that* free from all estates, titles, charges, and incumbrances created or occasioned by the said [*vendor*], or any person or persons claiming through or under him, or by means of his or their act or default; *And lastly*, that he the said [*vendor*], his executors or administrators, and every person claiming through or under him or them, will at any time hereafter, on the request and at the costs of the said [*purchaser*], his heirs or assigns, surrender or otherwise assure unto him or them, or as he or they shall direct, All and singular the premises hereby surrendered, or intended so to be, for all the residue now unexpired of the said term of twenty-one years, granted

SURRENDER OF LEASE FOR YEARS.

Parcels.

—And all the estate, &c.

To the intent that term may merge.

Covenants by vendor,

—That he has power to surrender,

—For quiet enjoyment;

—free from incumbrances;

—and for further assurance.

SURRENDER OF LEASE FOR YEARS.

by the hereinbefore recited indenture of lease, and for all other the estate, term, and interest of the said [*vendor*] in the said premises, by virtue of the same indenture, as by the said [*purchaser*], his heirs or assigns, or his or their counsel in the law shall be reasonably required. AND THIS INDENTURE ALSO WITNESSETH, that, in pursuance of the said recited agreement, and in consideration of the surrender hereinbefore contained on the part of the said [*vendor*], he the said [*purchaser*] *Doth*, by these presents, absolutely remise, release, and quit claim unto the said [*vendor*], his heirs, executors, or administrators, all and all manner of actions, suits, claims, and demands whatsoever, which he the said [*purchaser*] now hath, and which he, his heirs, executors, or administrators may or might hereafter have upon or against the said [*vendor*], his heirs, executors, or administrators, by reason of the hereinbefore mentioned arrear of rent and breach of covenants, or otherwise, by virtue or in respect of the hereinbefore recited indenture of lease, or any covenant, matter, or thing therein contained. IN WITNESS, &c.

Further *testatum*.

Release by purchaser to vendor.

SURRENDER OF ESTATE FOR LIFE.

SURRENDER *of an* ESTATE *for* LIFE *in Possession, and also of the* REMAINDER *expectant thereon of* TRUSTEES *to* PRESERVE CONTINGENT REMAINDERS (*a*).

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*vendor*], of &c., of the first part; [*trustees to*

Parties.

Reason for the junction of the trustees to preserve contingent remainders.

(*a*) The reason for requiring the junction of the trustees for preserving contingent remainders in this instance is, that their estate in remainder, being interposed between the respective estates of the vendor and purchaser, would, if left outstanding, have prevented the present deed from operating as a surrender. As no contingent remainder could in event become vested, it would not be improper to call on the trustees to surrender their estate.

preserve contingent remainders], of &c., of the second part; and [*purchaser*], of &c., of the third part. *(Re-*

SURRENDER OF ESTATE FOR LIFE.

If A. the father had been living, the purchased estate for life could not with propriety have been surrendered; for in that case, as he might have other children, who would have been entitled to share the remainder with their elder brother, the present purchaser, if they came *in esse* during the life of the tenant for life, (*i. e.* the vendor), the merger of the estate for life might give rise to some nice questions in regard to its effect upon the rights of such children, and there would be ground to contend that they participated in the benefit of the merger of the estate for life purchased by their elder brother. To prevent this consequence, the estate limited to preserve contingent remainders might have been left outstanding in the trustees, the purchased estate for life being conveyed by the vendor to the purchaser by lease and release.

As to mode of conveying particular estate, when purchased by remainder-man.

Indeed, though it has been deemed proper to furnish a form of a deed of surrender of an estate for life, yet it is not often that such a deed is wanted; for where a reversioner or remainder-man in fee purchases the preceding estate for life, it is generally advisable, instead of making the vendor surrender to the purchaser, which, if the estate for life was in possession, would render the wife of the latter dowable, to make them both join in limiting the entire fee-simple to uses to prevent dower, for the benefit of the purchaser.

Sometimes, however, it is proper to keep on foot the particular estate, and then, of course, this mode of assurance, which extinguishes that estate, must not be adopted, but the estate for life should be conveyed to a trustee for the purchaser, or, previously to his (the purchaser's) taking a conveyance of the life estate to himself, his reversion or remainder in fee might be vested in a trustee, and which would be attended with this advantage, that the determination of the preceding life estate, which would reduce the reversion or remainder to an estate in possession, would not let in his wife's dower. If the reversion or remainder had been previously limited to uses to prevent dower, it would still be necessary to convey the purchased estate for life to a trustee, if it were intended to keep it on foot, because such estate would merge in the estate for life of the purchaser, derived under those uses; if there was no intention of preserving the purchased estate for life, it might confidently be conveyed to the purchaser by way of surrender, as it seems to be clear beyond controversy that an estate *pur auter vie* will merge, and may, therefore, be extinguished by surrender in an estate for one's own life. *Vide ante*, p. 3.

Remedies against lessees destroyed by extinction of

One and the most frequent object in keeping on foot the particular estate, is to preserve the remedies against a lessee under a subsisting lease, derived out of that estate. Thus, supposing A. to be tenant for life, with

Recital of will.

cite will, whereby lands were devised to vendor for life, remainder to the trustees to preserve contingent re-

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immediate reversion.

remainder or reversion to B. in fee, and A. to grant a lease at rack-rent for twenty-one years, if he shall so long live, the lessee entering into the usual covenants, and then to sell his life-estate to B.; if the purchaser B. were to take a surrender of A.'s life estate, his claim to the rent, and his remedies on the covenants in the lease, would be lost by the extinguishment of the reversion immediately expectant on the lease to which such rent and covenants were incident. Thus, in the case of *Threr* v. *Barton*, Moore, 94, where a man made a lease for one hundred years, and the lessee made an underlease for twenty years, reserving rent, with a clause of re-entry; the first lessor granted the reversion in fee, and the grantee purchased the reversion of the term; and it was held, that he was neither entitled to the rent nor to a right to re-enter, for the reversion of the term to which it was incident was extinguished in the reversion in fee; and *Popham*, J., said, that if a man made a lease for life, and the lessee for life made a lease for years reserving rent, *and afterwards the lessee for life surrenders to him in reversion in fee*, he shall not have the rent of the lessee for years, nor an action of waste, for that the tenant for life who surrenders could not punish the waste in this case.

So, in the case of *Webb* v. *Russell*, 3 Durn. & East, 393, where A., being possessed of the residue of a term of ninety-nine years, demised the premises at a rack-rent for eleven years, and then by will bequeathed his term to C., who purchased and took a conveyance of the reversion in fee to herself, and afterwards brought an action against the lessee for rent; judgment was given for the defendant, on the ground that the reversion attendant on the lease granted to the defendant no longer existed.

But, if the lease were originally derived out of the inheritance in fee, the extinction of a particular estate, subsequently created, of course, would not affect the remedies against the lessee. Thus, in the case of *Threr* v. *Barton*, Moore, 94, it is laid down, that where a person (seised in fee) makes a lease for years reserving rent, and afterwards grants the reversion for life or for years, if the grantee surrenders this estate for life or years to the reversioner, he shall nevertheless have the rent, or an action of waste, *since the reversion out of which it was derived still subsists.* And the same principle would apply where a tenant for life grants a lease under a power contained in the deed creating his estate, for the estate of the lessee, in such a case, is derived out of the inheritance, and not out of the particular estate, he being *in* under the deed creating the power; and, therefore, on the extinguishment of the particular estate by surrender or otherwise, the reversioner or remainder-man has the same remedies by distress, entry, or action against the lessee as the tenant for life had. See *Isherwood* v. *Oldknow*, 3 M. & S. 382; *ante*, Vol. 4, p. 385.

mainders during the life of the vendor, with remainder to the child or children of A. *in fee; also the death of the testator without revoking or altering the will; probate of will; and that vendor was the only child of* A., *who was dead);* AND WHEREAS the said [*purchaser*] hath contracted with the said [*vendor*] for the absolute purchase of his estate for life in the —— and hereditaments hereinafter described, and hereby intended to be surrendered, at the price or sum of £——, and the said [*vendor*] and [*purchaser*] respectively have requested the said [*trustees*] to join in surrendering the same hereditaments in the manner hereinafter expressed, which the said [*trustees*] have agreed to do. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of £——, of &c., paid by the said [*purchaser*] to the said [*vendor*], at or immediately before the execution of these presents, the receipt &c., and also in consideration *(nominal consideration from purchaser to trustee)*, They the said [*trustees*], at the request and by the direction of the said [*vendor*] and [*purchaser*], testified by their severally executing these presents, *Have*, and each of them *Hath* bargained, sold, surrendered, and yielded up, and by these presents *Do*, and each of them *Doth* bargain, sell, surrender, and yield up, And the said [*vendor*] *Hath* granted, bargained, sold, surrendered, and yielded up, and by these presents *Doth* grant, bargain, sell, surrender, and yield up unto the said [*purchaser*], his heirs and assigns, ALL THAT *(describe parcels with general words)*, And all the estate, &c.; *To the intent* that the several estates of the said [*trustees*] and [*vendor*] respectively may be merged and utterly extinguished in and consolidated with the ultimate remainder and inheritance in fee-simple of the said hereditaments and premises hereby surrendered, or intended so to be, and to or for no other intent or purpose whatsoever. *(Covenant by trustees that they have done no act to incumber; also covenant by vendor that, notwithstanding any act done by him or by the testator, deceased, he has power to surrender; for peaceable enjoyment; free from incumbrances; and for further assurance).* IN WITNESS, &c.

SURRENDER OF ESTATE FOR LIFE.

—Contract for purchase.

Testatum.

Surrender.

Parcels.

Covenants.

ADVOWSON IN FEE.

GRANT *of an* ADVOWSON *in Fee, in* CONSIDERATION *of the Purchaser paying the same* ANNUITY *as the* VENDOR *had* COVENANTED *to* PAY *when he purchased it; with a* COVENANT *by the* PURCHASER *to* PAY *the* ANNUITY *and* INDEMNIFY (*a*). *(Variation where the Purchaser gives a Bond of Indemnity).*

Parties.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*vendor*], of &c., of the one part, and [*purchaser*], of &c., of the other part.

Recital of grant to vendor.

WHEREAS, by an indenture bearing date on or about the —— day of ——, ——, and made between [A. B.], of the one part, and the said [*vendor*], of the other part, *It is witnessed*, that, in consideration of the bond of the said [*vendor*], bearing even date with the indenture now in recital, in the penalty of £——, conditioned for the payment unto the said [A. B.] and his assigns, for his life, of an annuity of £——, clear of all deductions, at the times and in manner therein mentioned; and which said bond, and the said annuity thereby secured, are expressed to be in full for the absolute purchase of the advowson and hereditaments therein and hereinafter mentioned, and of the fee-simple and inheritance thereof, with the appurtenances, free from incumbrances, The said [A. B.] did grant, bargain, sell, and convey unto the said [*vendor*], his heirs and assigns, All that the advowson, donation, right of patronage and presentation of, in, and to the rectory or parish church of [R.], in the county of ——, with all and every the rights, members, and appurtenances whatsoever to the same belonging or in anywise appertaining, *To hold* the same unto and to the use of the said [*vendor*], his heirs and assigns, for ever.

Recital of an-

AND WHEREAS the said [A. B.] afterwards obtained

(*a*) As no pecuniary consideration passes from the purchaser to the vendor, this deed is not subject to an *ad valorem* stamp.

ADVOWSON IN FEE.

his Majesty's licence and consent to use the surname and bear the arms of [C.], instead of the surname and arms of [B.]; AND WHEREAS the said [*vendor*] hath agreed to grant the said advowson and hereditaments hereinafter mentioned unto and to the use of the said [*purchaser*], his heirs and assigns, in consideration of the (*b*) covenant hereinafter contained on the part of the said [*purchaser*] for payment of the said annuity of £——, so secured to the said [A. C.] during his life as aforesaid, and for the indemnity of the said [*vendor*], as hereinafter mentioned. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said recited agreement, and in consideration of the (*c*) covenant hereinafter contained on the part of the said [*purchaser*], his heirs, executors, and administrators, for payment of the aforesaid annuity of £——, and for the indemnity of the said [*vendor*], his heirs, executors, and administrators, And in consideration of 10*s.* to the said [*vendor*] by the said [*purchaser*] in hand paid at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, The said [*vendor*] *hath* granted, bargained, sold, and confirmed, and by these presents *doth* &c. (*d*), unto the said [*purchaser*], his heirs and assigns, ALL THAT the advowson, donation, right of patronage and presentation of, in, and to the rectory or parish church of [R.], in the said county of ——, with all and every the rights, members, and

Incumbent having changed his name.

Agreement to purchase.

Testatum.

Grant.

Parcels.

(*b*) If the purchaser gives a bond for payment of the annuity, which is, in general, the preferable course, the subsequent part of the recital will be varied thus:—

Variation where the purchaser gives a bond of indemnity.

"bond of the said [*purchaser*] hereinafter referred to, conditioned for the payment," &c.

(*c*) "bond of the said [*purchaser*], bearing even date with these presents, in the penalty of £——, conditioned for the payment of the aforesaid annuity, and for the indemnity of the said [*vendor*], his heirs, executors, and administrators therefrom, in the manner in the condition of the said bond expressed, And in consideration of 10*s.*," &c.

(*d*) In some of the printed forms, an advowson is conveyed by lease and release, but a lease for a year is quite unnecessary. Being an incorporeal hereditament, it passes by deed of grant.

ADVOWSON IN FEE.

appurtenances whatsoever to the same belonging, or in anywise appertaining, accepted, reputed, deemed, taken, or known as or to be part, parcel, or member thereof; And the

Reversion.

reversion and reversions, remainder and remainders thereof;

Estate.

And all the estate, right, title, interest, property, claim, and demand whatsoever of him the said [*vendor*], in, to, and out

Habendum.

of the said advowson and premises; To HAVE AND TO HOLD the said advowson, hereditaments, and premises hereby granted, or expressed and intended so to be, with the appurtenances,

To the use of purchaser in fee.

unto the said [*purchaser*], his heirs and assigns (*e*), To THE USE and behoof of the said [*purchaser*], his heirs and assigns, for ever, and to and for no other use, intent, or pur-

Covenant by vendor that he is seised in fee;

pose whatsoever. AND the said [*vendor*] doth hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said [*purchaser*], his heirs and assigns, in manner following, (that is to say), that notwithstanding any act, matter, or thing by him the said [*vendor*] made, done, committed, or suffered to the contrary, he the said [*vendor*] [is, at the time of the sealing and delivery of these presents, lawfully, rightfully, and absolutely seised of or entitled to the said advowson, hereditaments, and premises expressed to be hereby granted, and the inheritance thereof in

Has good right to convey.

fee simple; *And that*, notwithstanding any such act, matter, or thing as aforesaid, the said [*vendor*]] now hath in himself good right, full power, and lawful and absolute authority to grant and assure the same advowson, hereditaments, and premises, unto and to the use of the said [*purchaser*], his heirs and assigns, in manner aforesaid, and according to

For quiet enjoyment of the right of presentation.

the true intent and meaning of these presents; *And further*, that it shall be lawful for the said [*purchaser*], his heirs and assigns, from time to time, and at all times hereafter, whenever the said church shall, by the death, resignation, deprivation, cession, or change of any rector or incumbent thereof, or otherwise, happen to become vacant, to present some other qualified clerk to succeed in the said church, as the rector or parson thereof, and to do all other acts which shall of right appertain to the office of patron of the said rectory or church, as fully and amply as he the said [*vendor*], his heirs or assigns, might or could do if these presents had not been made, without any interruption or dis-

(*e*) If to uses to prevent dower, proceed *ut ante*, Vol. 7, p. 461.

turbance whatsoever from or by him the said [*vendor*], his heirs or assigns, or any other person or persons claiming through or under him or them; *And that* free and clear, and freely, clearly, and absolutely acquitted, exonerated, and discharged, or otherwise by the said [*vendor*], his heirs, executors, or administrators, effectually saved and kept harmless and indemnified from and against all former and other gifts, grants, charges, and incumbrances whatsoever, made, done, executed, committed, or suffered by the said [*vendor*], or any other person or persons claiming through or under him, or by or through his or their acts, default, means, consent, or procurement; *And moreover*, that he the said [*vendor*], his heirs and assigns, and every other person claiming through or under him or them, will, from time to time, and at all times hereafter, upon the request and at the costs and charges of the said [*purchaser*], his heirs or assigns, make, do, execute, levy, and suffer, or cause and procure to be made, done, executed, levied, and suffered, all such further acts, grants, conveyances, and assurances in the law whatsoever, for the more effectually granting and assuring the said advowson, hereditaments, and premises, with the appurtenances, unto and to the use of the said [*purchaser*], his heirs and assigns, or otherwise, as he or they shall direct, as by the said [*purchaser*], his heirs or assigns, or hisor their counsel in the law shall be reasonably devised or advised and required, so that no such further assurance contain or imply any further or other warranty or covenant than against the person or persons who shall make and execute the same, and his, her, or their heirs, executors, and administrators acts and deeds only, and so that the person or persons who shall be required to make and execute such further assurance or assurances be not compelled or compellable, for the making or doing thereof, to go or travel from his, her, or their usual place or places of residence or abode. AND THIS INDENTURE FURTHER WITNESSETH (*f*), that, in consi-

ADVOWSON IN FEE.

Free from incumbrances.

For further assurance.

Further *testatum*.

(*f*) If a bond is given by the purchaser, of course this *testatum* clause will be omitted. The convenience attending a bond is, that it is delivered to the obligee, whereas the covenant, being contained in the grant, passes into the hands of the covenantor.

ADVOWSON IN IN FEE.

deration of the grant hereinbefore made of the said advowson and premises with the appurtenances, the said [*purchaser*] doth hereby for himself, his heirs, executors, administrators, and assigns, covenant and agree with the said [*vendor*], his heirs, executors, and administrators, That he the said [*purchaser*], his heirs, executors, or administrators, will, from time to time, and at all times hereafter during the life of the said [A. C.], pay, or cause to be paid unto the said [A. C.] and his assigns, the said annuity or yearly sum of £——, secured to him and them by the said bond hereinbefore mentioned or referred to, bearing date on or about the —— day of ——, when and as the same annuity shall henceforth become due and payable; And also will, from time to time and at all times hereafter, save harmless and keep indemnified the said [*vendor*], his heirs, executors, and administrators, of, from, and against all actions, suits, and other proceedings which shall or may be brought, had, commenced, or prosecuted against the said [*vendor*], his heirs, executors, or administrators, and all costs, charges, damages, and expenses which he or they shall or may sustain, expend, be at or put unto by reason or on account of the non-payment of the said annuity or yearly sum of £——, by the said [*purchaser*], his heirs, executors, or administrators, pursuant to the covenant of the said [*purchaser*] hereinbefore contained. IN WITNESS, &c.

Covenant by purchaser to pay the annuity;

—And indemnify vendor.

GRANT OF NEXT PRESENTATION.

GRANT *of the* NEXT PRESENTATION *to a* RECTORY, *in Consideration of an Annuity secured by an Indenture of even Date. Covenants for the Title, and to produce Title Deeds.*

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*vendor*], of &c., of the one part; and [*purchaser*], of &c., of the other part: WHEREAS the said [*vendor*] is seised of or otherwise well entitled to the perpetual advowson, right of patronage and presentation of, in, and to the

Parties.

Recital of seisin.

rectory or parish church of ——, and the inheritance thereof in fee simple, of which rectory or parsonage the Reverend [A. B.] is the present incumbent; AND WHEREAS the said [*vendor*] hath agreed to grant and assign unto the said [*purchaser*], his executors, administrators, and assigns, the next turn or presentation to the said rectory or parsonage, when the same shall first and next happen to become vacant, in consideration of an annuity or clear yearly sum of £——, secured or intended to be secured to be paid to the said [*vendor*] and his assigns, free from all taxes and deductions whatsoever, during the term of his natural life, by half yearly payments, together with a proportional part of the said annuity for the time which, at the decease of the said [*vendor*], shall have elapsed of the half yearly payment thereof then growing due, by indenture bearing even date with these presents, and made or expressed to be made between the said [*purchaser*], of the first part, the said [*vendor*], of the second part, and [A. B.] and [C. D.], of the third part. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said contract and agreement, and for and in consideration of an annuity or yearly sum of £—— (*a*),

GRANT OF NEXT PRESENTATION.

—Of contract.

Testatum.

Consideration.

(*a*) No *ad valorem* duty would attach in this instance to the deed of grant of the next presentation, or to the deed granting the annuity which forms the consideration for it, neither the grant of the next presentation nor the grant of the annuity being for a pecuniary consideration; the transaction is simply an exchange. Where the consideration is pecuniary, the deed, of course, will bear an *ad valorem* stamp, as in the instance of the transfer of any other species of property.

In the case of *Wilmot* v. *Wilkinson*, 6 B. & C. 506; *S. C.* 9 D. & R. 620, A., by an instrument in writing not under seal, in consideration of 7,000*l.*, to be paid as thereinafter mentioned, agreed to present to a rectory, on the next avoidance, such person as B., the purchaser, should nominate, and to furnish an abstract of title, and execute a conveyance of the next presentation to B. This instrument was offered in evidence stamped as an agreement only; an objection was taken to its admissibility, on the ground that, if an avoidance had happened before the execution of a formal conveyance, equity would, upon the instrument in question, have decreed to the purchaser the next presentation; and that the instrument should, therefore, have had an *ad valorem* stamp upon the amount of the purchase-money: *Bayley*, J., however, answered this argument by observing, that equity might have compelled the execution of a conveyance, but that,

Contract for sale of next presentation not liable to an *ad valorem* duty.

GRANT OF NEXT PRESENTATION.

to the satisfaction of the said [*vendor*] secured or to be secured to be paid to him and his assigns during his life, by indenture bearing even date herewith as aforesaid, And also in consideration of the sum of 5*s*. of lawful money of Great Britain and Ireland to the said [*vendor*] in hand paid by the said [*purchaser*], at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, he the said [*vendor*] *Hath* granted, assigned, transferred, and set over, and by these presents *Doth* &c., unto the said [*purchaser*], his executors, administrators, and assigns, ALL THAT the first and next donation, nomination, presentation, and free disposition of and to the rectory and parish church of ——, aforesaid, which shall or may happen, accrue, or arise upon or in consequence of the vacancy or avoidance of such rectory or living, by death, resignation, cession, or deprivation, or by whatsoever other ways or means the said church shall first or next happen to be void, *so that and to the intent* that the said [*purchaser*], his executors, administrators, or assigns, shall and may, by force and virtue of these presents, nominate and present to the said rectory or church, whensoever the same church shall first and next happen to become vacant, by death, resignation, cession, or deprivation, or by any other ways or means, such fit and proper person as to him or them shall seem meet, and to do all other acts, matters, and things that shall or may be necessary or expedient to be done for that purpose, in as full, large, and ample a manner, to all intents and purposes, as the said [*vendor*], his heirs or assigns, might or could have done if these presents had not been made. AND the said [*vendor*], for himself, his heirs, executors, and administrators, doth covenant and agree with the said [*purchaser*], his executors, administrators, and as-

Grant.

Premises.

Covenant by vendor that he has good right to grant.

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by the stamp act, the *ad valorem* duty is imposed upon the conveyance of an interest, not upon the right to call for such conveyance; and *Littledale*, J., remarked, that the stamp must be taken as it was or was not sufficient at the time when the agreement was executed. Lord *Tenterden*, C. J., was of opinion, that whatever might be the language of the instrument, it could not operate as a grant of the next presentation, not being under seal; and he thought that the instrument was not intended so to operate. The stamp, therefore, was sufficient.

signs, by these presents, in manner following, that is to say, That, notwithstanding any act, matter, or thing, made, executed, committed, or suffered to the contrary by the said [*vendor*], he the said [*vendor*] hath now in himself good right and absolute authority to grant the next presentation of and to the said rectory and parish church of ——, aforesaid, unto the said [*purchaser*], his executors, administrators, and assigns in manner aforesaid, according to the true intent and meaning of these presents; *And further*, that it shall be lawful to and for the said [*purchaser*], his executors, administrators, and assigns, when the said church shall or may, by the death, resignation, cession, or deprivation of any rector or incumbent thereof, or otherwise, happen next to become vacant, to present some other qualified clerk to succeed in the said church as the rector or parson thereof, and to do all other acts which to the office of patron of the said rectory or church doth of right belong or appertain, as fully and amply as he the said [*vendor*], his heirs or assigns, might or could have done, if these presents had not been made, without any let, suit, denial, or interruption whatsoever, from or by the said [*vendor*], or any person or persons lawfully claiming through or under him; *And further*, that he the said [*vendor*] and his heirs, and all and every other person or persons lawfully claiming any estate, right, title, or interest, in, to, or out of the said advowson and premises, by, from, through, or under him or them, shall and will at any time or times, at the request, costs, and charges of the said [*purchaser*], his executors, administrators, or assigns, make, do, and execute, or cause and procure to be made, done, and executed, all such further and other lawful acts, deeds, matters, and things, conveyances and assurances in the law whatsoever, for the more effectually and absolutely granting, conveying, and assuring the said next presentation to the said rectory and church unto the said [*purchaser*], his executors, administrators, and assigns, as by the said [*purchaser*], his executors, administrators, or assigns, or his or their counsel in the law, shall be reasonably advised, or devised and required, so that the person or persons who shall be required to make and execute such further assurance or assurances, be not compelled or compellable, for the making or doing thereof, to go or travel from his, her, or their dwelling or dwellings, or usual place or places of

GRANT OF NEXT PRESENTATION.

For quiet enjoyment.

For further assurance.

GRANT OF NEXT PRESENTATION.

To produce deeds.

residence or abode; *And moreover*, that he the said [*vendor*], his heirs, executors, administrators, or assigns, shall and will from time to time, and at all or any time or times, until the right of presentation by virtue of these presents shall have been exercised by the said [*purchaser*], his executors, administrators, or assigns, and afterwards during the life of any clerk whom he or they shall so present to the said rectory or church, upon every reasonable request, and at the costs of the said [*purchaser*], his executors, administrators, or assigns, (he or they giving unto the said [*vendor*], his heirs or assigns, notice in writing of such his or their desire), produce and shew forth, or cause to be produced and shewn forth to the said [*purchaser*], his executors, administrators, or assigns, or as he or they shall direct, desire, or require, or at any hearing or examination in any court of law or equity, or other judicature, as occasion shall be or require, The several deeds, evidences, and writings mentioned in the schedule thereof hereunder written, and every or any of them, for the manifestation, defence, and support of the estate, right, title, interest, and property of the said [*purchaser*], his executors, administrators, and assigns, or any or either of them, in or to the said next presentation and premises hereby granted and assured, or intended so to be, Unless the said [*vendor*], his heirs, executors, administrators, or assigns, shall be prevented or hindered from so doing by casualty of fire or other inevitable accident (*b*). IN WITNESS, &c.

THE SCHEDULE to which the preceding indenture refers.

(b) It is quite unnecessary to introduce the clause sometimes inserted in grants of the next presentation to benefices, that, in case the right of presentation for the next turn should devolve to the crown, in consequence of the incumbent being promoted to a bishopric, the grantee shall have the next presentation following, since this would be the result without any express provision; *vide ante*, Vol. 1, p. 181, 2nd edit.; besides, the clause was generally defective, being confined to the case of the immediate incumbent being so promoted, whereas it ought to have gone on to provide for a similar event in regard to any future incumbent nominated by the crown. However, the clause ought not, even with this correction, to be inserted.

RELEASE IN FEE, ON THE PURCHASE OF A REMAINDER, AND TRANSFER OF MORTGAGES.

RELEASE *in* FEE, *on the* PURCHASE *of a* REMAINDER *in Fee expectant on an Estate for Life, subject to certain* MORTGAGES *affecting the entire Inheritance, (including the* ESTATE *in* POSSESSION), *and which are paid off by the Purchaser, but are assigned to Trustees for him, to be kept on foot as against the Tenant for Life* (*a*).

THIS INDENTURE, of seven parts, made the —— day of ——, ——, BETWEEN [*trustee for first mortgagee*], of Parties.

(*a*) The incumbrances are here kept on foot in order to be made available during the life of the tenant for life, for which period the purchaser is entitled to receive the interest on the principal sums in the character of mortgagee. On the decease of the tenant for life, his remainder falls into possession, and he, of course, takes the entire income as absolute owner. In the converse case of a tenant for life paying off mortgages affecting the inheritance, the incumbrances are in like manner preserved from extinguishment, in order that the tenant for life may be entitled to stand in the relation of mortgagee, with respect to the reversion or remainder. As this is a case of frequent occurrence in practice, the Editor had intended to furnish a precedent adapted to it under the title TRANSFERS OF MORTGAGES, but he was prevented from doing so by the consideration that the instrument had no other peculiarity than that the mortgage is transferred to a trustee for the tenant for life, instead of being vested in himself, a precaution which is particularly to be attended to if the mortgage were for a term, because such term, if vested in the tenant for life himself, would merge in his estate for life, and it would be inferred from his extinguishing the term that he intended to exonerate the estate. See *St. Paul* v. Viscount *Dudley & Ward*, 15 Ves. 173. On this subject, see 1 Pow. Mortg. by Coventry, 316; Patch, Mortg. 240. The obvious dictate of prudence in these cases is *explicitly to declare the intention.*

Remarks on the precedent in the text.

It will be observed, that, in the precedent in the text, the first mortgagee's term of five hundred years is assigned to a trustee for the purchaser, for the purpose of being held as a subsisting unsatisfied mortgage term, during the life of the tenant for life, and afterwards of attending the

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&c., of the first part; [*executors of first mortgagee*], of &c., executors named in the last will and testament of [*first mortgagee*], late of ——, aforesaid, of the second part; [*second mortgagee*], of &c., of the third part; [*vendor*], of &c., only son of [*tenant for life*], of ——, widow, of the fourth part; [*purchaser*], of &c., of the fifth part; [*dower trustee*], of &c., of the sixth part; and [*trustees of term*], of &c., of the seventh part. WHEREAS, by indenture bearing date the twenty-fourth day of June, 1810, and made between [*late owner*], therein described, and since deceased, of the one part, and the said [*first mortgagee*], deceased, of the other part, In consideration of the sum of 900*l.* to the said [*late owner*] paid by the said [*first mortgagee*], the said [*late owner*] did grant, bargain, sell, and demise unto the said [*first mortgagee*], his executors, administrators, and assigns, the messuage, barton, farm, lands, tenements, mills, and hereditaments hereinafter described and intended to be hereby granted and released, with their appurtenances, *To hold* the same unto the said [*first mortgagee*], his executors, administrators, and assigns, from the day next before the day of the date of the said indenture now in recital, during the term of five hundred years thence next ensuing, subject, nevertheless, to a proviso therein contained for making void the same term on payment to the said [*first mortgagee*], his executors, administrators, or assigns, of the sum of 900*l.*, with interest for the same after the rate of 5*l. per cent. per annum*, on the —— day of —— then next ensuing; AND WHEREAS, by indentures of lease and release, bearing date the twenty-first and twenty-second days of February, 1816, the release being made between the said [*late owner*], of the first part; [R. S.], of ——, sister of the said [*late owner*] (*b*), of the second part; the said [*first mortgagee*], of the third part; and the said [*trustee for first mortgagee*], of the

Recital of mortgage to first mortgagee for five hundred years, for securing 900*l.* and interest.

Recital of mortgage in fee, for securing further sum of 350*l.*

inheritance. The inheritance expectant on that term which was vested in a trustee for the first mortgagee, is conveyed to the limitations affecting the equity of redemption. By limiting the remainder in fee simply to the purchaser, the dower of his wife, when the remainder fell into possession, would have been let in.

(*b*) This lady was the present tenant for life, who will hereafter be referred to under that appellation.

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fourth part; the said messuage, barton, farm, lands, mills, tenements, tithes, and hereditaments, hereinafter described and comprised in the said hereinbefore in part recited indenture, were, in consideration of the further sum of 350*l.*, advanced and lent by the said [*first mortgagee*] to the said [*late owner*], conveyed and assured (subject to the aforesaid term of five hundred years) unto and to the use of the said [*trustee for first mortgagee*], his heirs and assigns, for ever, *In trust*, nevertheless, for the said [*first mortgagee*], his heirs and assigns (*c*), and subject to a proviso contained in the said indenture of release, by which it is declared, that, upon payment by the said [*late owner*], or the appointees, heirs, and assigns of the said [*present tenant for life*], unto the said [*first mortgagee*], his executors, administrators, and assigns, of the said sum of 900*l.* on demand, and of the said sum of 350*l.* on the twenty-first day of July then next, with interest for the same sums respectively, after the rate of 5*l. per cent. per annum*, the said [*trustee for first mortgagee*], his heirs and assigns, and also the said [*first mortgagee*], his heirs, executors, administrators, and assigns, would, at the request, costs, and charges of the said [*present tenant for life*], her heirs or assigns, convey all and singular the said hereditaments and premises, with their appurtenances, unto and to the use of the said [*present tenant for life*], her heirs and assigns, for ever (*d*); AND WHEREAS the said [*late owner*] died on or about the tenth day of May, in the year of our Lord 1816; AND WHEREAS, by an indenture, bearing date the tenth day of July, 1816, and made between the said [*present tenant for life*], of the first part; the said [*first mortgagee*], of the second part; and the said [*trustee for first mortgagee*], of

Death of late owner.

Further charge for securing 450*l.* to same mortgagee.

(*c*) The first mortgage having been for a term made to the mortgagee himself, this mortgage, which is in fee, is vested in a trustee, in order to prevent a merger of the term.

(*d*) Here the ownership in the equity of redemption is changed by the terms in which the right of redemption is limited by the proviso. In such cases, the intention to change the ownership should be clearly expressed by recital; though I am not aware of any case that has gone the length of saying that the giving a right of redemption to a person who had previously *no* interest, as seems to be the case here, would not be sufficient of istelf to change the property. *Vide ante*, Vol. 5, p. 278.

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the third part; in consideration of the further sum of 450*l.* to the said [*present tenant for life*] advanced and paid by the said [*first mortgagee*], she the said [*tenant for life*] did convey and assure unto the said [*trustee for first mortgagee*], his heirs and assigns, the said messuage, barton, farm, lands, mills, tenements, tithes, and hereditaments hereinafter described, *To hold* the same unto and to the use of the said [*trustee for first mortgagee*], his heirs and assigns, Upon trust for securing to the said [*first mortgagee*], his executors, administrators, and assigns, the payment of the said sum of 450*l.*, with interest for the same after the rate of 5*l. per cent. per annum*, as fully and effectually, to all intents and purposes, as the said several principal sums of 900*l.* and 350*l.*, and the interest thereon respectively, were secured; AND WHEREAS, by indentures of lease and release, bearing date respectively the twenty-second and twenty-third days of March, 1820, the release being made between the said [*present tenant for life*], of the first part; the said [*vendor*], therein described as the only son of the said [*tenant for life*], of the second part; and [A. B.], therein described, of the third part; It is witnessed, that, in consideration of the natural affection which she bore to her son, the said [*vendor*], and the nominal consideration therein mentioned, she, the said [*tenant for life*], did grant, release, and confirm unto the said [A. B.], his heirs and assigns, for ever, All and singular the said messuage, barton, farm, lands, mills, tenements, tithes, and hereditaments hereinafter described, with the appurtenances, *To hold* the same, (subject to the aforesaid incumbrances), unto the said [A. B.], his heirs and assigns, for ever, To the use of the said [*tenant for life*], during her life, without impeachment of waste; and, after the determination of that estate, To the use of such person or persons, for such estate or estates, interest or interests, by way of annuity, rent-charge, or otherwise, and in such manner, parts, shares, and proportions, and upon such trusts, and for such ends, intents, and purposes as the said [*vendor*], at any time or times during the lifetime or after the death of the said [*tenant for life*], by any deed or deeds in writing, to be sealed and delivered in the presence of one or more credible witness or witnesses, should direct, limit, or appoint; and in default of such direction or appointment, *To the use* of the said [*ven-*

Conveyance to the present vendor of a remainder in fee, expectant on an estate for life, limited to his mother, the donor.

dor] and his assigns, for his life, without impeachment of waste; with remainder *To the use* of the said [A. B.], his heirs and assigns, for the life of the said [*vendor*], *Upon trust* for the said [*vendor*] and his assigns, with the ultimate remainder *To the use* of the said [*vendor*], his heirs and assigns, for ever (*e*); AND WHEREAS, by inden-

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Recital of mort-

(*e*) Where a vendor claims immediately under a voluntary settlement or conveyance, the purchaser incurs the risk of the settlor having, antecedently to his purchase, sold the property for a valuable consideration; in which event, it is clear that the settlement would be void against the settlor's vendee. This doctrine is founded on the statute of the 27th of Elizabeth, cap. 4*, of which the following is a transcript:—

As to titles under voluntary conveyances.

" 'Forasmuch as not only the Queen's most excellent Majesty, but also divers of her highness' good and loving subjects, and bodies politick and corporate, after conveyances obtained or to be obtained, and purchases made or to be made, of lands, tenements, leases, estates, and hereditaments, for money or other good considerations, may have, incur, and receive great loss and prejudice by reason of fraudulent and covinous conveyances, estates, gifts, grants, charges, and limitations of uses heretofore made or hereafter to be made, of, in, or out of lands, tenements, or hereditaments so purchased or to be purchased; which said gifts, grants, charges, estates, uses, and conveyances, were or hereafter shall be meant and intended by the parties that so make the same to be fraudulent and covinous, of purpose and intent to deceive such as have purchased or shall purchase the same; or else, by the secret intent of the parties, the same be to their own proper use and at their free disposition, coloured, nevertheless, by a fained countenance and shew of words and sentences, as though the same were made *bonâ fide*, for good causes, and upon just and lawful considerations.'

Stat. 27 El. c. 4. Preamble.

Sect. 2. " For remedy of which inconveniences, and for the avoiding of such fraudulent, fained, and covinous conveyances, gifts, grants, charges, uses, and estates, and for the maintenance of upright and just dealing in the purchasing of lands, tenements, and hereditaments; be it ordained and enacted, by the authority of this present Parliament, That all and every conveyance, grant, charge, lease, estate, incumbrance, and limitation of use or uses, of, in, or out of any lands, tenements, or other hereditaments whatsoever, had or made any time heretofore sithence the beginning of the Queen's Majesty's reign that now is, or at any time hereafter to be

Every conveyance, charge, &c. made to the intent to defraud purchasers, void against such purchasers.

* Compare this statute with stat. 13 Eliz., stated *ante*, Vol. 6, p. 184. It is singular, that, even at this day, the distinct objects of the two statutes of Elizabeth are sometimes confounded. See 3 Moo. & Pay. 25.

gage to second mortgagee (subject to former mortgages) for

ture bearing date the tenth day of October, 1820, and made between the said [*tenant for life*] and [*vendor*], of the one

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had or made, for the intent and of purpose to defraud and deceive such person or persons, bodies politick or corporate, as have purchased or shall afterwards purchase in fee-simple, fee-tail, for life, lives, or years, the same lands, tenements, and hereditaments, or any part or parcel thereof, so formerly conveyed, granted, leased, charged, incumbred, or limited in use, or to defraud and deceive such as have or shall purchase any rent, profit, or commodity in or out of the same, or any part thereof, shall be deemed and taken only as against that person and persons, bodies politick and corporate, his and their heirs, successors, executors, administrators, and assigns, and against all and every other person and persons lawfully having or claiming by, from, or under them or any of them, which have purchased or shall hereafter so purchase, for money or other good consideration, the same lands, tenements, or hereditaments, or any part or parcel thereof, or any rent, profit, or commodity in or out of the same, to be utterly void, frustrate, and of none effect; any pretence, colour, fained consideration, or expressing of any use or uses to the contrary notwithstanding.

Penalty.

Sect. 3. " And be it further enacted, by the authority aforesaid, That all and every the parties to such fained, covinous, and fraudulent gifts, grants, leases, charges, or conveyances before expressed, or being privy and knowing of the same or any of them, which, after the twentieth day of April next coming, shall wittingly and willingly put in ure, avow, maintain, justify, or defend the same or any of them, as true, simple, and done, had or made, *bonâ fide*, or upon good consideration, to the disturbance or hindrance of the said purchaser or purchasers, lessees or grantees, or of or to the disturbance or hindrance of their heirs, successors, executors, administrators, or assigns, or such as have or shall lawfully claim any thing by, from, or under them or any of them, shall incur the penalty and forfeiture of one year's value of the said lands, tenements, and hereditaments so purchased or charged; the one moiety whereof to be to the Queen's Majesty, her heirs and successors, and the other moiety to the party or parties grieved by such fained and fraudulent gift, grant, lease, conveyance, incumbrance, or limitation of use, to be recovered in any of the Queen's Courts of record, by action of debt, bill, plaint, or information, wherein no essoin, protection, or wager of law shall be admitted for the defendant or defendants; and also, being thereof lawfully convicted, shall suffer imprisonment for one half year, without bail or mainprize.

Act not to impeach convey-

Sect. 4. " Provided also, and be it enacted by the authority aforesaid, That this act, or any thing therein contained, shall not extend or be con-

part, and the said [*second mortgagee*], of the other part, in consideration of the sum of 250*l.* to the said [*tenant for* one thousand years, for securing 250*l.* and interest.

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strued to impeach, defeat, make void, or frustrate any conveyance, assignment of lease, assurance, grant, charge, lease, estate, interest, or limitation of use or uses, of, in, to, or out of any lands, tenements, or hereditaments, heretofore at any time had or made, or hereafter to be had or made, upon or for good consideration, and *bonâ fide*, to any person or persons, bodies politick or corporate, any thing before mentioned to the contrary hereof notwithstanding. ances made *bonâ fide*.

Sect. 5. "And be it further enacted, by the authority aforesaid, That if any person or persons have heretofore, sithence the beginning of the Queen's Majesty's reign that now is, made, or hereafter shall make, any conveyance, gift, grant, demise, charge, limitation of use or uses, or assurance, of, in, or out of any lands, tenements, or hereditaments, with any clause, provision, article, or condition of revocation, determination, or alteration, at his or their will or pleasure, of such conveyance, assurance, grants, limitations of uses or estates, of, in, or out of the said lands, tenements, or hereditaments, or of, in, or out of any part or parcel of them, contained or mentioned in any writing, deed, or indenture of such assurance, conveyance, grant, or gift; and after such conveyance, grant, gift, demise, charge, limitation of uses, or assurance, so made or had, shall or do bargain, sell, demise, grant, convey, or charge the same lands, tenements, or hereditaments, or any part or parcel thereof, to any person or persons, bodies politick and corporate, for money or other good consideration paid or given, (the said first conveyance, assurance, gift, grant, demise, charge, or limitation, not by him or them revoked, made void, or altered, according to the power and authority reserved or expressed unto him or them in and by the said secret conveyance, assurance, gift, or grant), that then the said former conveyance, assurance, gift, demise, and grant, as touching the said lands, tenements, and hereditaments, so after bargained, sold, conveyed, demised, or charged against the said bargainees, vendees, lessees, grantees, and every of them, their heirs, successors, executors, administrators, and assigns, and against all and every person and persons which have, shall, or may lawfully claim any thing by, from, or under them or any of them, shall be deemed, taken, and adjudged to be void, frustrate, and of none effect, by virtue and force of this present act. Conveyances with clause of revocation, void against purchasers.

Sect. 6. "Provided, nevertheless, That no lawful mortgage made or to be made *bonâ fide*, and without fraud or covin, upon good consideration, shall be impeached or impaired by force of this act, but shall stand in the like force and effect as the same should have done if this act had never been had nor made; any thing in this act to the contrary in anywise notwithstanding." No lawful mortgage to be impeached.

It does not appear to have been expressly decided whether copyholds *Semble*—Copy-

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life] and [*vendor*] paid by the said [*second mortgagee*], They the said [*tenant for life*] and [*vendor*] Did demise,

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are within the statute. The affirmative was laid down, *arguendo*, in *Glover* v. *Cope*, 3 Lev. 327, and was taken for granted in *Kirk* v. *Clark*, Pre. Ch. 275; but neither of these cases raised the point. It was also one of the questions discussed in the case of *Doe* d. *Watson* v. *Routledge*, Cowp. 710; but the opinion of the Court upon other questions rendered it unnecessary to determine this. Lord *Mansfield*, however, thought that the statute did extend to copyhold estates, because, in being so construed, it could work no prejudice to the lord, and the object of the statute was to suppress fraud. Mr. Justice *Aston* expressed an opinion to the same effect. See also 2 Watk. Cop. 191; Scriv. Cop. 71; Rob. Fraud. Conv. 447.

holds are within the statute.

Not personal estate.

It is clearly settled, that it does not extend to personal estate; *Jones* v. *Croucher*, 1 Sim. & Stu. 315; unless, indeed, such as is included under the denomination of "lands, tenements, or other hereditaments," which are the words of the statute, *i. e.* chattel-interests in land.

Divisions of the subject.

It will be convenient to discuss the operation of the statute under four divisions—to inquire: *First*, what is the nature of the conveyance or charge which the 2nd section of the statute makes void against purchasers;—*secondly*, what is a conveyance or charge, with clause of revocation, &c., which the 5th section makes void against purchasers, which will include a particular inquiry into the extent of the marriage-consideration;—*thirdly*, who is a "purchaser" within the meaning of these vacating provisions;—*fourthly*, as to the effect of third persons acquiring an interest as purchasers in the estates created by a voluntary settlement in protecting such settlement against the claims of purchasers from the settlor.

Whether the voluntary conveyance and the sale should be made by the same person.

First—As to the nature of the conveyance or charge which the 2nd section of the statute makes void against purchasers. Under this head of inquiry, the first question is, whether it is essential to the operation of the statute that the voluntary conveyance and sale should both be made by the same person, or whether the settlement of A. may be avoided by a purchase from B., claiming or deriving title from A. The latter is the adjudged construction of the statute, according to Sir E. B. Sugden, (Treat. Vend., 8th edit. 648), who says, "It hath been holden, that although the fraudulent conveyance is not made by the vendor himself, yet it is void against the purchaser. Therefore, if a father make a fraudulent lease, and then die, and the person claiming under him sell the estate, the purchaser shall avoid the lease, whether the vendor did or did not know of its existence." *Burrell's* case, 6 Rep. 72; *Jones* v. *Groobham*, Co. Litt. 3. b. The latter of these cases is not relevant to the learned author's position, but merely negatived the application of the statute to

grant, bargain, and sell unto the said [*second mortgagee*], his executors, administrators, and assigns, the said messu-

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the case of a lessee, forging a lease for a term longer than his own, and selling the forged lease. *Burrell's* case, however, is not so easily disposed of, for the resolutions in that case certainly maintain the doctrine in question, but the case itself, attentively examined, does not go so far. The facts were as follow:—Grandfather, father, and son; the grandfather (24 Eliz.), by indenture, made a demise of the moiety of the tenements to Seth, the father, to begin after the death of the grandfather, for one thousand years, and of the other moiety for one thousand years, to begin at a day to come; in both which demises were provisoes, that if the father should die without issue, or if he should make any lease upon which the ancient rent should not be reserved, that the said leases made to the father should be void. The father (30 Eliz.) assigned over the said leases to the use of Robert, his son, an infant, to the intent that they might not be merged by the descent of the reversion, and with this colourable purpose and intent, that the infant should pay debts. Shortly after, the grandfather died. After the death of the grandfather, the father, for a great sum of money, bargained and sold the tenements by deed indented and enrolled (44 Eliz.) to Richard Burrel and another, and their heirs, in which the father covenanted with Burrel and another, that the lands should be clear of all leases, &c. And if the said original leases, or the assignment, should be avoided by the purchasers by the statute of 27 Eliz. c. 4, was moved and debated. Two points were unanimously resolved by *Coke*, C. J., *Walmsley*, *Warburton*, and *Daniel*—First, that if the father makes a lease by fraud and covin of his land, to defraud others to whom he shall demise or sell it, (as all fraudulent leases should be so intended), and before the father sells or demises it, he dies; and the son, knowing or not knowing of the said lease, sells the land on good consideration, in that case the vendee shall avoid that lease by the said act; for, inasmuch as it is intended and presumed in law that every fraudulent lease is made to the intent generally to defraud purchasers, farmers, &c., within this generality, every particular purchaser, farmer, &c. is included; and the said act is very well penned, for the words of the act are general; *and it is not necessary that he who sells the land should make the former fraudulent estate, or incumbrance; but be the estate, &c. fraudulent,* ut supra, *whosoever makes it, the purchaser shall avoid such fraudulent estate, &c.;* and, therefore, in the case at bar, the said leases being on the evidence thought fraudulent, the vendee of the father and heir shall avoid them. Secondly, it was resolved, that although the father had nothing in the inheritance of the land at the time of the assignment of his term, but the

Lease and assignment avoided in favour of a purchaser, though the lease was made by the father of the vendor.

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age, barton, farm, lands, mills, tenements, tithes, and hereditaments hereinafter described, with the appurtenances,

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whole estate of inheritance was then in the grandfather; yet, when the grandfather died, and the father sold the land, his vendee shall avoid the said term by the said act, (the said assignment on the evidence being taken to be fraudulent), for, if he had bargained and sold the said term only, the bargainee should avoid the said fraudulent assignment; and by consequence the vendee of the whole fee simple shall avoid it. And it was said by the Chief Justice, that that which is called a trust between the father and the son, is, in judgment of law, fraudulent as to a purchaser.

Remarks upon *Burrel's* case.

It will be observed, that, though the resolutions of the Court go the whole length of maintaining that a settlement by a deceased owner may be avoided by his heir, yet the determination of the Court does not involve such a proposition. The terms were granted by the grandfather to the father, who made a voluntary settlement of them, or rather an assignment upon trusts for his own benefit, for the objects of the deed simply are to prevent the merger of the terms, and to pay the father's debts. He afterwards acquired the reversionary inheritance, and sold the whole fee simple, (including of course the terms as well as the reversionary inheritance), to Burrel and another; and all therefore that the Court had to declare was, that this assignment was superseded by the sale of the entire inheritance in possession, in which case the term was merged in the inheritance; and it was quite unnecessary for the learned Judges to have gone on to declare that the lease of the grandfather was void against the purchaser. Indeed, the case did not require the introduction of the grandfather's name at all, for in effect it was nothing more than this:—A., the father, having two terms of one thousand years in the respective moieties of the lands in question, assigned those terms without any consideration to C. The inheritance expectant on the term then descended upon him, and he sold both the term and the reversion to B. and another, against whom his voluntary alienation of the term was clearly void. The resolution of the Court then, in propounding a doctrine extending so far beyond the circumstances of the case, was of an extra-judicial character. It would carry the operation of the statute to a most mischievous extent, if a settlement may be avoided by a purchaser from the immediate heir of the settlor, the same principle must extend to a purchaser from an heir claiming through any number of intermediate gradations of descent, and for any period; and so a person might sell lands which had been aliened half a century ago by his great grandfather. Besides, according to the general terms of the doctrine in question as stated by Sir E. B. Sugden, the power given to purchasers of avoiding voluntary alienations would ex-

subject nevertheless to the payment of the said several sums of 900*l.*, 350*l.*, and 450*l.*, and interest, due to the said

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tend to purchasers from the devisee as well as the heir of the settlor, or, where the subject was a chattel real, from his executors or administrators*.

But by far the strongest argument against the construction in question may be drawn from the import and terms of the statute itself, which vacates conveyances, &c., "made *for the intent and of purpose to defraud and deceive* purchasers;" which words necessarily imply that the conveyance and the sale proceed from the same person; for how is the intent to defraud purchasers to be collected or inferred from the mere act of making a settlement, unless the settlor afterwards disposes of the same lands to a purchaser? Where a man settles lands, and afterwards sells them, the law, looking simultaneously at these several acts, sees the motive for the one in the other. The sale shews *quo animo* the previous settlement was executed; but if there is no sale, upon what is the inference of fraudulent intention to be built? Certainly not upon the sale by the heir, over whose acts the settlor has no control, and to disinherit whom might have been his sole object in making the conveyance.

It is satisfactory to find that the construction of the act here contended for, does not rest upon arguments alone, but is supported by respectable authority. Thus, in the case of *Jones* v. *Purefoy*, 1 Vern. 45, where Purefoy's grandfather made a settlement on the marriage of his grandson, in which there was a proviso making it void in case the marriage did not take effect in ten months afterwards. Purefoy, the father, borrowed money on the estate, and now the grandson set up this deed of settlement in opposition to the mortgagee's claim. It was objected by the plaintiff, that this settlement was but a voluntary settlement, and therefore could never prevail against a purchaser, and that without notice: but as to that objection, they gave this clear answer:—It was true it was a voluntary settlement;

Settlement of father not voidable by mortgagee of son.

* That it does not belong to a donee by deed was ruled in *Clerk* v. *Rutland*, Lane, 113, Roberts, 386; where it was doubted, if a father make a lease to a stranger for forty years, and continues in possession, and afterwards conveys the lands to a younger son, who, for a valuable consideration, conveys it over, if the purchaser should avoid the lease: but it was said, that if in that case the father, after making such lease, had suffered the land to descend to his eldest son, then the purchaser from the eldest son should avoid the lease, as was ruled in *Burrel's* case. This *dictum*, therefore, so far as it goes, recognises the doctrine against which the observations in the text are directed.

Purchaser from donee of settlor cannot avoid voluntary conveyance of settlor.

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[*first mortgagee*], and secured as aforesaid, *To hold* the same unto the said [*second mortgagee*], his executors, ad-

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and *if it had been made by the person that mortgaged these lands, it should never prevail against a purchaser. But here the settlement was made by the grandfather, and the estate passed from him; but the mortgage was made by the father, who was never seised or possessed of the estate.* The Lord Chancellor *(Nottingham)*, however, decreed in favour of the mortgagee, on evidence that the marriage did not take place in ten months. If, therefore, the doctrine of *Burrel's* case can stand at all, it must be confined to instances in which a person creates a lease or partial estate, leaving the land charged with this lease, &c., to descend to the heir*, and has no application to cases in which the voluntary settlement comprised the whole of the settlor's interest, leaving nothing to descend to the heir. And Mr. Roberts, in his Treatise on "Voluntary and Fraudulent Conveyances," p. 378, thinks that the cases establish such a distinction. Probably the Courts would adopt it, if they conceived that it afforded to them the only means of avoiding the general doctrine of *Burrel's* case, fraught, as that doctrine is, with absurdity and mischief. The distinction, however, seems not to rest on any solid foundation. A lease is, *pro tanto*, an alienation, and differs only from an alienation of the fee, as part differs from the whole. Both are regulated by the same principle. The Judges, in their resolution in *Burrel's* case, appear to have had no such distinction in view, but intended to lay down a general proposition; and as that proposition is supported only by the *dictum* in *Clerk* v. *Rutland*,

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* The consequence of even this qualified admission of the doctrine would be, that if a man, desirous that the whole of his real estate should not descend to his eldest son, makes a settlement of certain parts of his estate upon his younger children, and instead of limiting to them a fee, and, perhaps choosing to adopt a less expensive mode of conveyance than any which could operate upon the fee, demises to each younger child his share for one thousand years, the eldest son, upon whom the dry reversion had descended at his father's death, might, the day after that event, openly sell the lands settled on his brothers and sisters, discharged from their respective terms, and put the purchase-money in his pocket, without the possibility of the injured parties obtaining any satisfaction or redress; and to produce this consequence, the words of a statute must be strained beyond their fair import, and in deference to the authority of a case in which the decision of the Court may be supported on other grounds. Surely, at the present day, the Judges would pause before they lent their sanction to such a doctrine, not forced upon them by irresistible authority.

ministrators, and assigns, for the term of one thousand years, subject as aforesaid, upon such trusts as are therein

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is irreconcilable with the opinion of Lord *Nottingham* in *Jones* v. *Purefoy*, (*vide ante*, p. 148), and the fair construction of the statute, and, moreover, was not called for by the determination of the case in which it was advanced; it is submitted, that the doctrine, even in the most qualified and limited extent, is not to be relied on, or, at all events, that the general position of the distinguished writer, whose opinion is stated in the outset of these observations, is clearly untenable.

What conveyances are void against purchasers.

The next point for inquiry is—*What is the nature of the conveyance or charge which the 2nd section of the statute makes void against purchasers*, as it respects the CONSIDERATION by which such conveyance is supported.

Voluntary settlement on a stranger void against a purchaser.

A conveyance to a stranger in blood, without pecuniary or other valuable consideration, seems to fall most immediately within the policy and vacating operation of the statute. An instance of this is afforded in *Standen's* case, cited 5 Rep. 60, where one Bullock had made a fraudulent conveyance of his land to A., B., and C., and afterwards, notwithstanding, sold the land to Standen, who had notice of the previous conveyance; and it was held, that Standen should avoid the said fraudulent conveyance, "for the notice of the purchaser cannot make that good which an act of Parliament made void as to him." This was the first case establishing the inefficacy of notice to defeat the claim of a purchaser, a point on which a few observations will be found in the sequel.

A more recent instance of the application of the statute to a voluntary conveyance to a stranger in blood appears in the case of *Doe* d. *Bothell* v. *Martyr*, 1 New Rep. 332, where W. Bothell, by lease and release, conveyed lands to the use of trustees, upon trust to permit him to receive the rents during his life, and, after his decease, upon trust to pay the rents to any children of W. Bothell, until they attained twenty-one, and then to convey to them as tenants in common, and upon failure of issue of W. Bothell, *upon trust to convey the same to W. Dudley, and his heirs.* After the execution of this settlement, W. Bothell sold the land to Thomas Bothell, who gave a bond for the purchase-money. W. Bothell afterwards died without issue. On an ejectment brought by the heir-at-law of the devisee of Dudley against the persons claiming under the purchaser, the Jury having found a verdict for the lessor of the plaintiff, on the ground that the conveyance to T. Bothell was fraudulent, the Court granted a new trial, Sir *James Mansfield* observing, that they could not, without overturning the settled law, hold that a prior voluntary conveyance could defeat a conveyance to a purchaser for a valuable consideration.

Conveyance in

So it is clear that natural love and affection do not constitute a suffi-

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declared, for securing the payment unto the said [*second mortgagee*], his executors, administrators, and assigns, of

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consideration of natural love and affection, void against a purchaser.

cient consideration to support a settlement against a purchaser; for, however strong may be the *moral* claim of the person in whose favour the donor's bounty has flowed, or however apparently defensible, or even laudable, were the motives of the settlor in the disposition he has made, that disposition falls before the paramount claims of a purchaser; and the distinction made by Lord *Mansfield* in *Doe* v. *Routledge**, and by Lord Chief Justice *Wilmot* in *Roe* v. *Mitton*, and other Judges, between proper and improper settlements, is completely overthrown by the authorities, which shew that, for all the purposes of the statute, it is enough that the one claimant is a volunteer, and the other is a purchaser for valuable consideration. No other ingredient of fraud is requisite.

Thus, in the case of *Doe* d. *Otley* v. *Manning*, 9 East, 59, where A., a reversioner in fee, in the year 1783, by indentures of lease and release, reciting, that he was desirous of making a provision for his mother and sisters and brother, in consideration of the natural affection which he bore towards his mother and sisters and brother (naming them), conveyed the premises in question to his mother for life, remainder to trustees during the lives of the sisters and brother, upon trust to pay the rents equally among them, and to the survivor of them, remainder to A. in fee; with power to the mother during life, with the consent of A., to make leases. In 1805 (previously to which the reversion had fallen into possession), A., for a pecuniary consideration, sold and conveyed the premises to the lessor of the plaintiff in fee. The purchaser, who had notice of the settlement in 1783, before the payment of the whole of his purchase-money, brought an ejectment against the mother, and was held to be entitled to recover. Lord *Ellenborough*, after an elaborate view of the authorities, concluded his judgment with the following observations:— "Thus stand the authorities on both sides the question; and the weight, number, and uniformity of those which establish the point contended for on behalf of the plaintiff do, in our opinion, very much preponderate; and as many estates depend upon the rule, it ought not, we conceive, to be shaken. It appears from the MS. note I have cited, formerly belonging to Mr. Justice *Clive*, that Mr. Horsman, in the year 1713, advised the making a mortgage of the estate settled in strict settlement by Sir R. Alderson after his marriage, thinking it voluntary and fraudulent as against

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* It is lamentable to find exploded doctrines of this kind sometimes adduced in support of a decision which requires no such aid. See the judgment of Lord Chief Justice *Best*, now Lord *Wynford*, in *Gully* v. The Bishop of *Exeter*, 2 Moore & Payne, 271.

the said sum of 250*l.*, and interest; AND WHEREAS the said [*first mortgagee*] departed this life on or about the thirtieth

Death of first mortgagee, and appointment of executors.

a purchaser; and the like advice as that which he gave nearly a century ago probably had been given before: and that it has been given since, and acted on, we cannot doubt, as Lord *Thurlow* was not likely to have expressed himself as he did in *Evelyn* v. *Templar*, (*post*, p. 153), unless he had known that such had frequently been the case. Feeling ourselves pressed with these authorities and considerations, we think ourselves bound to give judgment for the plaintiff. Much property has, no doubt, been purchased, and many conveyances settled upon the ground of its having been so repeatedly held, that a voluntary conveyance is fraudulent, as such, within the statute 27th of Eliz.: and it is no new thing for the Court to hold itself concluded in matters respecting real property by former decisions upon questions, in respect of which, if it were *res integra*, they probably would have come to very different conclusions. And if the adhering to such determinations is likely to be attended with inconvenience, it is a matter fit to be remedied by the Legislature, which is able to prevent the mischief in future, and to obviate all the inconvenient consequences which are likely to result from it as to purchases already made."

The same noble Judge had again occasion to apply the principle in the case of *Doe* d. *Parry* v. *James*, 16 East, 212, where a purchaser brought an ejectment against the son of the vendor, claiming under a settlement after marriage, of which he (the lessor of the plaintiff) had notice. Lord *Ellenborough* remarked—There is nothing to vary this from the common case of a purchaser claiming against a prior voluntary settlement; it is clear that notice of such a settlemnt cannot vary the question, it amounts only to notice of a settlement which was void against the subsequent purchaser for valuable consideration.

Notice to the purchaser immaterial.

This argument, which is also advanced in some of the earlier cases, begs the question; for the question is, whether a person buying with notice *is* a purchaser against whom the statute makes void prior voluntary settlements? That the Courts, in the construction of a statute intended to protect against fraud, should have disregarded the fact of notice, has been the subject of much surprise and regret; and it has been asked with much reason, how, if there be no concealment, can "fraud" or "deceit" have been practised upon a purchaser? See 1 New Rep. 335, 9 East, 71, 18 Ves. 110. The effect of such construction has certainly been to carry the operation of the statute far beyond what was requisite for the protection of purchasers, and to convert it into an engine of moral fraud, by enabling a dishonourable settlor indirectly to avoid his own voluntary disposition. But the rule, whatever may be its merits or demerits, cannot now be called in question for an instant; and no attention is to be paid

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day of March, 1820, having duly made and published his last will and testament in writing, dated the sixth day of De-

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to some cases, which virtually impugn it by the undue stress which is laid upon the fact of the purchaser *not* having had notice, as strengthening his title to relief. See 2 Ch. Cas. 123, Cro. Jac. 158. The circumstance ought to be omitted in the statement of the case as wholly immaterial.

An examination of the preceding cases will shew, that the statute so completely nullifies the settlement against the purchaser, that he has merely to bring an ejectment against the persons in possession under the settlement, without the necessity of taking any preliminary step whatever; which, it is conceived, may be brought at any time within twenty years after the purchaser's title to enter accrued.

Post-nuptial settlement void against a subsequent purchaser.

A settlement in favour of the settlor's wife and children, unless made in consideration of a prospective marriage, or in pursuance of an antenuptial contract, or induced by some consideration moving from the wife or her friends at the time of its execution, is equally untenable against a purchaser. Thus, in *Woodie's* case, cited Cro. Jac. 158, where one after marriage voluntarily assigned a lease for years *quasi* in jointure for his wife, and took the profits, and afterwards sold it and the jointure-settlement, it was adjudged to be within the statute, although at first it was not made upon trust to be revoked, nor any clause of revocation therein, because it was a voluntary conveyance at first, and shall be intended fraudulent at the beginning. So, in the case of *Chapman* d. *Staverton* v. *Emery*, Cowp. 278, it appeared that, by indentures of lease and release, of the 28th and 29th of March, 1766, between Richard Emery, and Mary his wife, of the one part, and Thomas Plummer and Joseph Turner, of the other part; the said Richard Emery, in consideration of ten shillings, and for divers other good causes and considerations, conveyed the said premises to the said Thomas Plummer and Joseph Turner, in trust for the said Richard Emery for life, remainder to his wife for life, remainder to the issue of the said Richard Emery, and Mary his wife, in tail, with remainder to the right heirs of the said Richard Emery for ever. By indentures of lease and release, of the 3rd and 4th of October, 1769, between the said Richard Emery and the defendant, Mary his wife, of the one part, and Deodatus Staverton, of the other part; the said Richard Emery made a mortgage in fee of the premises in question to the said Deodatus Staverton, for securing the payment of 750*l.*, by annual instalments, the last of which was to be made on the 4th of October, 1776, with a covenant to levy a fine to the use of the said Deodatus Staverton; but no fine was levied, nor were the said indentures of lease and release ever executed by the defendant Mary. This was an ejectment brought

cember, 1809, and thereof appointed the said [*executors of first mortgagee*] executors, who have duly proved the same

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by the heir-at-law of the mortgagee against Mary Emery, claiming under the settlement. It was proved that the mortgagee had notice of the settlement; but Lord *Mansfield* observed, that notice made no difference, and held that the lessor of the plaintiff was entitled to recover.

Purchaser not affected by settlor's covenant to pay purchase-money to trustees.

The statute avoids the whole settlement, to the extent, at least, of the subsequent disposition of the property, and of the produce of it. And therefore, where a deed, which gave a power of sale to the settlor, contained a covenant on his part to pay the purchase-money to the trustees, to be laid out upon the trusts of the settlement, it was held that a purchaser, the sale to whom was made, not under the power in, but adversely to, the settlement, was not bound to regard this covenant, but might pay the money to the settlor himself. This point was decided in the case of *Evelyn* v. *Templar*, 2 B. C. C. 148, the facts of which were as follow:—In 1761, the plaintiff's father, Charles Evelyn, by settlement after marriage, conveyed the premises to trustees to the use of himself for life, remainder to trustees to preserve contingent remainders, remainder to trustees to pay an annuity to his wife for her life, remainder to trustees for a term to raise 4000*l.* for younger children, remainder to his first and other sons. In the settlement was a proviso:—That it should be lawful for Charles Evelyn, by deed executed in the presence of three witnesses, to revoke the uses and to sell the estate, *but he covenanted that the money to be raised by the sale of the lands should be paid to the trustees,* to be by them laid out, at the request of the parties, in the purchase of lands to be settled to the same uses, and in the meantime to be placed out on securities to the same uses. Charles Evelyn was not indebted at the time of the settlement. The bill also stated that James Templar, now deceased, purchased the settled premises of Charles Evelyn, and paid the purchase-money to him; that he had notice of the settlement and covenant, and insisted that he ought to have paid the purchase-money to the trustees, and not to Charles Evelyn. But Lord *Thurlow*, C., dismissed the bill, observing, that though it would have been as well if the voluntary covenant had not been thought so little of, yet the rule was such, and so many estates stood upon it, that it could not be shaken.

Remarks upon *Evelyn* v. *Templar*.

This case has been much commented on in subsequent cases, and presents the strongest instance of the application of the vacating provisions of the statute that can be adduced. Had the sale been made under the power in the settlement, of course the purchaser would have been bound by the covenant; but, being made in opposition to the settlement, the covenant as well as the other parts of the settlement were void against him, though, as between the parties, it would have been operative and binding; for the trustees, it is conceived, might have

That all said principal sums remain due to executors of first mortgagee.

will in the Prerogative Court of Canterbury; AND WHEREAS the said several principal sums of 900*l.*, 350*l.*, and 450*l.*,

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sustained an action at law against the settlor for his breach of the covenant. That, however, was their only remedy, for equity, though it will execute a trust voluntarily created, will not enforce the specific performance of an executory contract or covenant in a voluntary settlement, or, according to the language of Lord *Eldon* in *Pulvertoft* v. *Pulvertoft*, 18 Ves. 93, "do any thing" under such a covenant. Lord *Hardwicke*, however, on one occasion decreed to the disappointed donees of a voluntary settlement (being the natural children of the settlor,) satisfaction out of the deceased settlor's assets, on the ground that the settlement, though voluntary, contained covenants for title. *Williamson* v. *Codrington*, 1 Ves. sen. 511. In this case the donor, subsequently to the execution of the settlement, had been actually evicted from the estate by an adverse claimant, to whom he afterwards relinquished all his title on receiving 1050*l.*

As to covenants in voluntary conveyances.

It is clear that if the deed of settlement contains no covenants, the persons aggrieved by the donor's sale of the settled property have not any remedy against him, either at law or in equity, for the destruction of their interests. See 1 Ves. sen. 515. Indeed, the Editor is not aware of any case in which an attempt has been made to recover damages at law even upon covenants for title in such a deed, probably, rather because voluntary settlements rarely contain such covenants, than because any doubt exists that an action would lie. The insertion of covenants for title in voluntary settlements was denounced as very improper by Sir *John Strange*, M. R., in the case of *Cray* v. *Mansfield*, 1 Ves. sen. 379, where he decreed the defendant, who had obtained a conveyance from the plaintiff under rather suspicious circumstances, and without an adequate consideration to release the covenants, this being, his Honour observed, a middle course between setting it aside and letting it exist totally.

Purchase in the name of a child not within the statute.

It seems, that where a parent purchases an estate in the name of a child, it is not within the statute. This was decided in Lady *George's* case, cited Cro. Car. 550, where A. purchased a manor in the name of B., his daughter, and afterwards kept courts and made leases in his own name, and then sold the manor to C., and died. The daughter never called in question the purchaser's title in the lifetime of her father, but it was held, that, unless there was some fraud discovered, the case was not within the statute 27th Eliz. cap. 4. Perhaps, it is not quite clear, that the principle of this case would apply where the parent enters into a contract for purchase, and then directs the conveyance to be made to the child, in which case it is not a purchase in the name of a child, but a purchase in his own name, and a transfer of his equitable interest under the contract to the child.

Settlement after

That a settlement made after marriage, in pursuance of a contract en-

making together the sum of 1,700*l.* still remain due and owing to the said [*executors of first mortgagee*], as executors

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tered into before marriage, becomes, by its connexion with such antecedent contract, the subject of the same species of protection which belongs to pre-nuptial settlements, is a consequence of the well-known doctrine of equity, which considers that as done which is agreed to be done. A leading authority on this point is Sir *Ralph Bovy's* case, 1 Vent. 193, where the facts were, that, upon a treaty of marriage between F. D. and the daughter of W. S., it had been agreed, by articles reciting that a portion should be paid, (which was proved to have been afterwards paid), that F. D., who was possessed of a legal estate in the lands in question for a term of ninety years, and entitled to the trust of the inheritance of the same lands, should convey them to himself and his wife, and the heirs of their two bodies, by way of jointure for his wife and provision for the family; the marriage took effect; after the marriage, F. D., by indenture, reciting the said articles, assigned his term of ninety years to W. S. and another, in trust for himself for life, remainder to his wife for life, and afterwards to the heirs male of their two bodies; and by the same deed limited the trust of the inheritance in the same manner. Subsequently to the execution of this conveyance, the settlor, for a valuable consideration, granted a rent out of the settled lands of 400*l. per annum*, with power to the grantee to enter and hold till satisfaction; and afterwards, the said F. D. and his wife being dead, and the rent being in arrear, the grantee entered, and then the trustees assigned the term of ninety years to Sir W. D., the heir male of the said F. D., and his wife, and lessor of the plaintiff. It was without difficulty adjudged, that the settlement, being in pursuance of articles made before the marriage, had not the least colour of fraud to enable a purchaser to avoid it; and that an agreement for such a settlement would have been sufficient*.

marriage in pursuance of antenuptial articles, good against purchaser.

That the payment of a portion by the friends of the wife on the execution of a settlement made after marriage, makes her a purchaser of the interest taken by her and her children, so as to support such settlement against subsequent purchasers, was a doctrine very early established. Thus, where the husband, in consideration of an additional portion of 100*l.* paid by the wife's mother, settled an estate of 100*l. per annum* upon himself for life, remainder to his first and other sons, &c., and thirteen years after mortgaged this estate, with the usual covenants; and, upon his death, the mortgagee brought his bill against the son to foreclose: Lord *Talbot* said—It would be very hard to call this a fraudulent settlement; since it

Post-nuptial settlement supported by consideration moving from the wife.

* See other cases illustrative of this doctrine very fully stated by Mr. Roberts, Volunt. Conv. 218.

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of the said [*first mortgagee*], upon or by virtue of the said several mortgage securities hereinbefore mentioned to have

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was in consideration of a marriage had, and of an additional provision of 100*l.* paid by the wife's relations. *Jones* v. *Marsh*, Ca. Temp. Talbot, 64. See also *Colvile* v. *Parker*, Cro. Jac. 158*.

As to the extent of the marriage consideration.

Though marriage is a good consideration to support a settlement against purchasers, yet, in the application of this principle, an important question has arisen as to the extent of such consideration, whether, according to the opinion of Lord *Macclesfield*, in the case of *Osgood* v. *Strode*, 2 P. Wms. 255, "the marriage and marriage portion support only the limitation to the husband and wife, and their issue," or, whether, as suggested by Sir *Matthew Hale* in *Jenkins* v. *Kemyshe*, Hardr. 398, the consideration "will run to all the estates raised by the settlement, although the marriage is not concerned in them, so as to make them good against purchasers, and to avoid a voluntary conveyance;" but which latter opinion is irreconcilable with that expressed by the same distinguished Judge on another occasion, when his Lordship treated a limitation in a marriage settlement to a stranger as voluntary, and "not to be supported against a purchaser." See *Roscarrick* v. *Barton*, 1 Ch. Cas. 220.

In order to ascertain what is the present state of the law upon this question, it will be necessary to take a cursory view of the cases. One of the earliest of these is St. *Saviour's* case, Lane, 22, where it was held, that if a man doth, in consideration that his son shall marry the daughter of B., covenant to stand seised to the use of his son for life, and after to the use of his other sons in remainder, these uses thus limited in remainder are fraudulent against the purchaser, though the first be upon good consideration, namely, marriage.

So, in *Staplehill* v. *Bully*, Pre. Cha. 223, a limitation in a settlement on the marriage of an eldest son, to the second son in tail, after an estate tail limited to the eldest son, was considered to be voluntary. See also *White* v. *Stringer*, 2 Lev. 105, where the special grounds on which the settlement was supported seem to render this case as an authority for the *voluntary* character of the limitation.

Marriage consideration held not to extend to the settlor's brothers and their issue.

A late and very important case on this subject is *Johnson* v. *Legard*, 6 Mau. & Selw. 60, which was a case sent from Chancery to the Court of King's Bench. The facts were shortly as follow:—Sir J. L., in consideration of an intended marriage and of a marriage portion, settled his estate by lease and release to the use of himself, for life; then to trustees to preserve contingent remainders; remainder to the use that his intend-

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* As to the other cases on this subject see Sugd. Vend. & Purch. 8th ed. 656.

been made to the said [*first mortgagee*]; And the said principal sum of 250*l.* still remains due and owing to the

And said principal sum of 250*l.* to second mortgagee.

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ed wife should receive a rent-charge thereout for life, for her jointure; remainder to the use of the first and other sons of the marriage in tail male; remainder to the use of the first and other sons of the settlor, by any future wife, in tail male*; remainder to the *use of the settlor's brothers respectively, for life, and to their first and other sons respectively, in tail male.* Sir J. L. died without issue, having previously sold part of the settled estate to a purchaser, who had notice of the settlement. The creditors of Sir J. L. filed a bill against the purchaser and others, to compel the performance of the contract. A case was sent to the Judges of the Court of King's Bench, who certified, in opposition to a very ingenious argument of Sir *E. B.* (then Mr.) *Sugden*, that none of the limitations in the settlement subsequent to the limitations to the first and other sons of the settlor by a future wife, was good against the purchaser. Sir *J. Leach*, V. C., confirmed the certificate without argument; 3 Madd. 283; but Lord *Eldon* reversed his Honour's decree, upon the ground that, even considering the limitations in question as voluntary, yet still the contract could not be enforced against a purchaser; and his Lordship's reasons for this conclusion were, first, that the party had no equity to defeat his own settlement; and secondly, that a settlement originally voluntary, and therefore void against a purchaser, might be supported by considerations arising *ex post facto*†. *Johnson* v. *Legard*, 1 Turn. & Russ. 281.

The grounds upon which Lord *Eldon* rested his determination leave wholly untouched the point of law involved in the certificate of the Court of King's Bench, and his Lordship deprecated any such construction of it. Indeed, he is said to have expressed, in the course of the argument, an opinion, that if there had been nothing more in the case than that the settlement was made upon the marriage, the remainders would have been held to be voluntary, and void against a subsequent purchaser. Another passage in his Lordship's judgment, however, would seem to shew that the ultimate leaning of his mind was the other way; for he observes:—"It is infinitely too late to comment on the original decisions on the statute of Elizabeth; but when one looks at the terms of the statute, one is certainly a little surprised to hear it said, that, if a man upon his marriage thinks proper, after providing for his issue, to limit his property to his own brothers and sisters, that is so fraudulent a thing that the party is to be considered guilty of a misdemeanor." But with great

Remarks upon *Johnson* v. *Legard.*

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* As Sir J. L. died without issue, the point as to this limitation to the issue by any future wife did not arise.

† As to this, *vide post*, p. 171.

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said [*second mortgagee*], upon or by virtue of the said recited indenture, bearing date the tenth day of October, 1820;

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deference it is submitted, that this observation conveys rather a partial view of the case; for the misdemeanor consists not in the mere act of making the settlement, but in that of first settling the property, and then, in contravention of the rights of the donees, selling it to a third person.

Observations on the preceding cases.

Treating, therefore, as we are authorized to do, the Vice Chancellor's decree in *Johnson* v. *Legard* as uncontradicted by what passed on the appeal, all the cases that have been stated uniformly support the doctrine which confines the scope of the marriage consideration to the immediate objects of the institution, namely, the husband and wife and their issue, negativing the extension of it to collateral objects: and though some cases remain to be noticed, in which limitations to collateral objects have been sustained against purchasers, on the strength of the marriage consideration; yet it will be found that they rest upon particular grounds, and therefore are rather to be considered as exceptions to than as impugning the general doctrine. That doctrine, indeed, seems to be far more consistent with legal principles than the notion that the marriage consideration extends to all the estates raised by the settlement, "though the marriage is not concerned in them;" for it is difficult to understand why the introduction into a marriage settlement, of limitations in favour of objects collateral to and unconnected with the marriage, should impart to those limitations a protection and support which would not have belonged to them if contained in another instrument. Such a principle, pushed to its full extent, might lead to very preposterous results. Thus, if a parent, upon the marriage of his son, should, in alleged consideration of that marriage, settle lands upon a remote relation, or a stranger, leaving the objects of the marriage quite out of the question, the accidental concomitant of the marriage would render the settlement good against a purchaser. Indeed, it might even happen that the consideration of the son's marriage might operate to clothe a remote relation, or stranger, with the character of purchaser for valuable consideration, to the subversion of a prior settlement in favour of the son himself and his children, made before the marriage was in contemplation. Another word need not be said as to the absurd consequence to which the doctrine in question leads.

Cases in which the marriage consideration has extended to collateral objects.

I proceed now to the consideration of cases in which limitations in favour of objects collateral to the marriage have been supported on special grounds. It should seem, that if such limitations are interposed between other limitations, which are clearly within the influence of the marriage consideration, they are protected by that circumstance. Thus, in the case of *Clayton* v. Earl of *Wilton*, 6 Maul. & Selw. 67, where A., previously to his marriage with N., and in consideration of a portion, conveyed the estate in question to the following uses, to arise on the marriage, namely,

but all interest for the said several mortgage debts has been paid to the said [*executors of first mortgagee*] and the said

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to himself, for life; remainder to trustees, to preserve contingent remainders; remainder to N., to receive thereout a rent-charge for her jointure; remainder to the first and other sons of A., by N., in tail male; remainder to the first and other sons of A. *by any after taken wife*, in tail male; remainder to the daughters of A., by N., in tail general; with cross remainder; with reversion to A. in fee. N. died without issue, and A., after her death, conveyed part of the settled estate to S. in fee, for a full and valuable consideration. The question in a case from Chancery was, whether the settlement, as it regarded the children of a future marriage, was void against S., being a purchaser for valuable consideration. Lord *Ellenborough*, and the other Judges of the Court of King's Bench, certified their opinion, that the conveyance to the purchaser was not valid against the issue of the second marriage.

Remarks upon *Clayton* v. Earl of *Wilton*.

As the consideration of the projected marriage of the settlor clearly did not extend to the issue of a *future* marriage, this case can only be distinguished from the case of *Johnson* v. *Legard*, on the ground that the limitation to the sons of the second marriage was prior to the limitation to the daughters of the first marriage. This circumstance it has in common with the case of *Roe* d. *Hamerton* v. *Mitton*, 2 Wils. 356, where, however, the mother of the intended husband, whose estate was the subject of the settlement, released a charge she had on it, and became by that means, it was considered, a purchaser of the interest taken by the younger son, the brother of the settlor, under the limitation, the validity of which was in dispute; and this formed, it should seem, the principal ground of the determination.

Limitation to a brother of the marrying settlor, supported by a consideration moving from their parent.

The case was as follows:—John Hamerton, in 1706, being seised in fee of the lands in question, and at the same time having a mother living, who had an annuity of 50*l.* issuing out of the whole lands, and having two brothers, Thomas and Vavasor, entered into a treaty of marriage with Mary Kelly. The mother of John, previously to the marriage, agreed to part with her security upon the whole lands for her annuity, and to take, instead thereof, a security for the same upon part of the lands. Accordingly, she and her son John (the intended husband) joined in a fine, to deliver the whole lands from the said annuity; and, in consideration of the marriage, and a portion of 1,200*l.*, and of the said release of the said annuity, John Hamerton conveyed the lands to trustees, upon trust to pay 50*l.* a-year to the mother out of part of the lands, for her life; then, as to the whole of the lands, to the use of John Hamerton, for his life, remainder to trustees to support contingent remainders; remainder to the first and every other son, in tail male; *remainders to Thomas Hamerton*

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[*second mortgagee*] respectively, as they do hereby respectively acknowledge; AND WHEREAS [*purchaser*] hath con-

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and Vavasor Hamerton, severally, one after the other, in tail male, in strict settlement; remainder to the daughter and daughters of the marriage of John Hamerton and Mary Kelly; remainder to John Hamerton in fee. After the execution of this settlement, John Hamerton sold the estate to Monkton, for a valuable consideration, in fee, and died without issue. The lessor of the plaintiff was the son of Thomas. Lord Chief Justice *Wilmot* said, that the single question was, whether there was a good and valuable consideration to support the limitation in the settlement to Thomas Hamerton, the late father of the lessor of the plaintiff, or whether that limitation was merely voluntary, under the statute 27 Eliz., and bad against a purchaser for a valuable consideration. "The whole of this question," continued his Lordship, " turns upon the mother's joining in the settlement. This is a good consideration to John the son, (and the *quantum* is not at all material), he purchases his wife by his mother's concurrence. But it was objected, that John was seised, and could have made the settlement without the mother, and that, in truth, no real or good consideration moved from her at all, for that she still had her annuity charged upon part of the lands. In answer to this, the applying to the mother shews that John Hamerton could not have made a settlement agreeable to the lady's friends, without the mother; and I am of opinion that any consideration given by the mother would have made her a purchaser for her younger sons. By the limitation to the daughters of the marriage, after that to the two brothers of John Hamerton, it is plain the mother intended her sons should be preferred to the daughters of the marriage; and this is as plain to me as if I heard the mother say, ' I will not part with my annuity secured upon the whole lands, and take a security for it upon part of the lands, unless you will prefer my sons to your daughters.' The settlement can have no other meaning, and any consideration moving from a parent to a child is good." The whole Court were of the same opinion, and judgment was given for the plaintiff.

So, in the case of *Jones* v. *Marsh,* Cas. Temp. Talb. 64, where A., after marriage, in consideration of a portion paid by his wife's mother, settled the estate on himself for life, remainder to his first and other sons, &c., and A.'s mother, who had an interest in the estate, joined in the conveyance, the settlement was held to be good against a subsequent mortgagee; and one of the grounds for this decision was the fact of the settlor's mother having parted with her estate, which Lord *Talbot* considered made her a purchaser of the limitations to her grandchildren.

As to a valuable consideration

The principle was also recognised by Lord *Eldon* in the case of *Pulvertoft* v. *Pulvertoft,* 18 Ves. 92, where his Lordship observed, " In the

tracted with the said [*vendor*] for the absolute purchase of the remainder or reversion in fee simple, expectant on the

Contract for purchase of remainder in fee, subject to incumbrances.

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case of a father, tenant for life, with remainder to his son in tail, they may agree, upon the marriage of the son, to settle not only upon his issue, but upon the brothers and uncles of that son; and the question would be, whether they, though not within the consideration of the marriage, are not within the contract between the father and son, both having a right to insist upon a provident provision for uncles, brothers, sisters, and other relations, and to say to each other, 'I will not agree unless you will so settle.' The Court has held such a claim not to be that of a mere volunteer, but as falling within the range of the consideration." As his Lordship conceived that the value of the consideration arose out of the contract between the father and son, as owners of their respective interests, independently of the marriage, the doctrine may be more simply illustrated by leaving the fact of the marriage quite out of the case. The principle then seems to be this:—If A., tenant for life, and B. his eldest son, the remainder-man, mutually agree that each will convey his estate to C., the younger brother of B., if the other will do the same, and they respectively make such conveyance, the conveyance is not voluntary as to either of them, each being in point of fact the purchaser of the estate of the other for the benefit of C.; and the case is the same in principle as if the parties mutually agreed to exchange their estates, the only difference being, that, instead of conveying to each other, they respectively convey to a third person who *happens* (for this is only an accident,) to be the nominee of *both*. In this view of the case it seems to be quite immaterial whether the person for whose benefit this arrangement is made is a relative of both or either of the parties, or a stranger, for the value of the consideration consists not in the relationship of the contracting parties to their nominee, but in the fact of their respectively parting with their estates. If the tenant for life relinquishes nothing, but takes under the new limitations the same interest which he had before, and the remainder-man, out of whose estate the interest of the third person is derived, obtains no advantage as the price or consideration for his making the settlement, the principle in question seems not to apply; for, in this case there is no mutuality, and without mutuality there can be no contract out of which any valuable consideration capable of sustaining the settlement against a purchaser can arise. The conveyance is then in effect merely a settlement by the remainder-man, and must be regarded in the same light as if he were the sole conveying party, in which case it would be clearly voluntary as resting on the consideration of natural affection alone. If, on the other hand, the tenant for life by his junction in the conveyance enables the remainder-man, who has an estate tail only, to suffer a

growing out of a contract between the owners of several distinct intrests.

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decease of the said [*tenant for life*], of and in the messuage, barton, farm, lands, mills, tenements, tithes, and here-

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common recovery and thereby acquire the fee, probably this would be deemed a consideration moving from the tenant for life, which might render him a constructive purchaser of estates taken by his younger children under the uses of the recovery, though he himself took under those uses an estate precisely similar to that which he had before. He confers a benefit on the remainder-man, but relinquishes nothing. No case could present a stronger instance of the absence of any consideration *ultra* the marriage, to support the limitation to the collateral objects, than *Johnson* v. *Legard*. As the estate moved from the husband, there was no person to contract for the benefit to be taken by the brothers of the husband (since a man cannot contract with himself,) but the wife, from whom a stipulation in their favour could hardly have been supposed to emanate, unless, as suggested in the argument of Sir *E. B. Sugden*, she might have required that the remainder should be limited to them for the purpose of insuring the regular payment of her rent-charge, which seems rather too refined. According to the doctrine of this case, where the intended husband is the settlor, a limitation to his brothers, or to the issue of any future wife, is not within the influence and protection of the consideration of the projected marriage, but is voluntary. Farther than this the case does not go, and it would be in vain to speculate as to what would have been the decision of the Court, if the objects of the collateral limitation had been the relatives of the wife instead of the relatives of the husband; and it is to be hoped that the application of the principle under consideration will be determined by some criterion less fluctuating and fallible than the greater or less probability of this or that class of persons being objects of favour with one or both of the contracting parties, so as to bring them by supposed contract within the range of the consideration.

As to the effect of the statute, where the voluntary conveyance was made by fine or recovery.

A word should be said as to the operation of the statute, where the voluntary conveyance is made by means of a fine or common recovery. In such case it does not vacate the fine or recovery so as to render it necessary that another assurance of the same nature should be made to the purchaser, but merely changes the course or destination of the uses, making the fine or recovery enure to the benefit of the subsequent purchaser. *Fermor's* case, 3 Rep. 80; *Fitzjames* v. *Moys*, 1 Sid. 133; Rob. Vol. Conv. 205; *Cormick* v. *Trapaud*, 6 Dow, 60. And it should seem that where a tenant in tail suffers a recovery, and resettles the estate in favour of the persons who were entitled in remainder expectant on the estate tail, this circumstance does not sustain the limitation against the operation of a subsequent sale. Thus, in the case of *Cormick* v. *Trapaud*, 6 Dow, 60*,

* This case arose on the Irish statute 10 Car. 1, sess. 2, c. 3, which corresponds with the statute of 27 Eliz.

ditaments hereinafter described, subject to the said sums of 900*l.*, 350*l.*, and 450*l.*, secured to the said [*first mortgagee*]

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where the settlor was tenant in tail, with remainder to his brothers in tail, he agreed to settle the estate previously to his marriage, but did not extend the limitations to his brothers; he after marriage settled the estate pursuant to the articles, with remainders to his brothers for life, and their issue, in strict settlement, and then suffered a recovery: it was held that the limitations to the brothers were voluntary limitations, and were, therefore, void against a mortgagee of the settlor.

As to conveyances with clause of revocation.

Secondly.—What is a conveyance or charge, with clause of revocation, &c., within the 5th section of the statute? The points for consideration under this head lie in a narrow compass; for it is immaterial what is the nature of the consideration for the conveyance in which the clause of revocation is found. The reservation of the revoking power, independently of all other circumstances, exposes the deed to the vacating operation of the statute; and the parties claiming under the limitations of the vacated deed, whether they have given a valuable consideration or not, have no reason to complain, since they have left an absolute power of defeating those limitations in the settlor; and the result of the statute is merely to make a conveyance for valuable consideration tantamount to an exercise of the power. But the notion of the sale being a statutory exercise of the power, must not induce the supposition that the existence of the power at the time of the sale is essential to the operation of the statute, though this doctrine has sometimes been contended for. Thus, in the case of *Bullock* v. *Thorne*, Moore, 616, it was argued, that the power had been extinguished by a fine levied by the settlor, in the interval between the settlement and the sale, and therefore, that the case was out of the statute; for, it was said, the statute made the conveyance void which ought to have been revoked, and supplied the duty of the party himself who ought to have revoked, and neglected so to do; but, if the party was unable to revoke, there the statute had no means of avoiding the conveyance, because the party could not avoid it himself: the Court, however, unanimously decided against this objection. The learned Judges said, that, if the case in question were examined by the letter of the statute, it would be found to fall within it in three particulars: *viz.* there was a power of revocation mentioned in the deed; the conveyance was not revoked according to the power; the person making the conveyance afterwards bargained and sold the land to a purchaser for valuable consideration.

If the power of revocation has been exercised for a valuable consideration, the case would clearly be out of the statute; and it seems to be the better opinion, that the same rule would apply where it has been released

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and now due to his executors as aforesaid, and to the said sum of 250*l.* secured to the said [*second mortgagee*]

for such a consideration. See Sugd. Vend. 8th ed. 670; which see also in regard to the question whether a purchaser, in whose favour the settlor professes, but fails to exercise his power, can avail himself of the statute.

Power of revocation to be exercised with consent, not within the statute.

Where the power of revocation is to be exercised with the consent of third persons, it is clearly not within the statute. Thus, in the case of *Buller* v. *Waterhouse*, Sir Thomas Jones, 94, where A. and his wife in her right were seised in fee of a rectory, and in consideration of the marriage of their son, and of a portion, covenanted with B. and three others, relations of the intended wife, to levy a fine of the rectory to the use of A. for life, remainder to his wife for life, remainder to the son and his heirs, and in the indenture it was provided that it should be lawful for A. or his wife to revoke the uses, with the consent of the said four persons, or the survivors or survivor of them, or of the executors or administrators of the survivor, testified under their hands and seals. The fine was levied. The wife survived A., and sold the rectory, and it was held that the settlement was good against the purchaser. The Court assented to the argument, that the words in the act "at their will and pleasure" were to be interpreted, at their choice, liberty, and election, *i. e.* without the restraint of any person; but that, in the case before them, the will and pleasure of the party were made to depend upon the will and pleasure of others.

Contra where the requisition of consent is colourable only.

But where the requisition of the concurrence of third persons appears to be intended merely as a contrivance to evade the operation of the statute, and not as a real check upon the exercise of the power; as, where the consent of some third person is required, who is evidently nominated by and is under the influence of the grantor, the imposition of this nominal restraint is ineffectual to take the case out of the statute. See *Lavender* v. *Blackstone*, 3 Keb. 526, 752; see also 3 Rep. 826. So, where the settlor is empowered to revoke on payment of a nominal or trifling sum of money. *Griffin* v. *Stanhope*, Cro. Jac. 454.

Power to charge a specific sum, not within the statute.

Of course, a power to charge a specific sum of money is not within the statute; and therefore, in the case of *Jenkins* v. *Kemyshe*, 1 Lev. 150, where the settlor, upon his son's marriage, reserved by the settlement a power to himself, by deed in writing, to charge the settled lands with the payment of 2000*l.*; Lord *Hale*, and the rest of the Court, held that this power was not within the words of the statute, to "revoke, determine, or alter" the estate. But the fact that the terms of the power differ from the terms of the statute, does not exclude it, if the absolute dominion be in effect given to the settlor. Thus, in the case of *Lavender* v. *Blackstone*, 2 Lev. 146, a power to the settlor to make leases of all or any part of the lands for any number of years, with or without any rent, was held to be, in effect, a power of defeating, at his pleasure, the whole settlement. So,

as aforesaid, and the interest henceforth to become due on the same sums respectively, at or for the price or sum of

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in the case of *Tarback* v. *Marbury*, 2 Vern. 510, where A. made a conveyance to B. and others, of his estate, to the use of himself for life, with power to mortgage such part of the estate as he should think fit, the Court held that such power amounted, in effect, to a power of revocation, and was therefore fraudulent as against creditors by statute and judgment.

Thirdly.—Who are "purchasers," *within the meaning of the 2nd and 5th sections of the statute?* Vendees for a pecuniary consideration fall most obviously and directly under this appellation. The only objection that can be made to the claim of such persons is the inadequacy of the price given.

Who are purchasers within the statute.

On this point it was laid down, soon after the passing of the statute, that, if a man makes a conveyance without any consideration, and afterwards one procures him for 500*l.*, or other petty consideration, to sell unto him land worth 500*l. per annum*, although this last purchaser pays money, yet he shall not avoid the first conveyance. *Upton* v. *Basset*, Cro. El. 445; 3 Rep. 83 a.

As to inadequacy of price.

In the case of *Doe* d. *Watson* v. *Routledge*, Cowp. 705, a settlement in favour of the settlor's nephew was sustained against a purchaser for money, on the ground of the inadequacy of the price given by the latter, which was only 200*l.*, while the value of the estate was at least 2000*l.* And Lord *Eldon*, in *Metcalfe* v. *Pulvertoft*, 1 Ves. & Bea. 183, in allusion to this case, expressed an opinion that a purchase for a third part of the value would not prevail against a voluntary settlement.

But mere inadequacy of price will not defeat the claim of a purchaser, unless it be such as to amount to evidence that it was not a *boná fide* purchase, but colourable, to get rid of the settlement. And therefore, where evidence was offered that an estate, which was sold for 400*l.*, was worth more, Lord *Ellenborough* considered it not material, unless it went this length—he asked if the estate was shewn to be of the value of 4000*l.* instead of 400*l.* *Doe* d. *Parry* v. *James*, 16 East, 212.

Indeed, to these cases may be applied the observation which has been made in regard to persons claiming to be considered as purchasers under the general rule of equity, that the question is not, whether the consideration they have given is *adequate*, but whether it is *valuable*. See *Bullock* v. *Sadlier*, Amb. 776.

Old deed supported against subsequent purchasers, on the considerations expressed in it.

The sufficiency of a very small pecuniary consideration, in a deed of great antiquity, underwent much discussion in the case of *Gully* v. Bishop of *Exeter*, 2 Moore & Payne, 266. The deed in question was dated 19th of April, 1672, whereby A., being seised in fee of the fourth turn to an advowson, "in consideration of the sum of 20*s.* paid to him by B., and

Agreement to pay off said mortgages, on having said

£——; AND WHEREAS the said [*purchaser*], at the request of the said [*executors of first mortgagee*], as executors as

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for true and faithful service done to A. by B., as also for divers good and valuable causes and considerations, granted the said fourth turn of the advowson to B. In 1692, A. settled the property upon his marriage; and the question was, whether the considerations expressed in the deed of 1672 were sufficient to prevent its being voluntary and void against the persons claiming under that settlement; and it was held that they were sufficient. *Best*, C. J., said, "If the sum of 20*s.*, as expressed on the face of the deed, had been clearly nominal, as in cases of small sums, *viz.* 5*s.* or 10*s.*, now usually alleged to have been paid by trustees, or in like instances, it might not have been an adequate consideration; but, considering that the deed was executed more than one hundred and fifty years ago, and regard being had to the fluctuation and depreciation in the value of money since that period, it would be too much for us to say that 20*s.* was at that time nothing more than a mere nominal consideration, or that it might not be the value of the fourth share in an advowson from which the purchaser might never derive any benefit." In regard to the other expressed consideration, namely, the service done, the learned Chief Justice observed, "It has been further said, that, if a person bargain and sell land in consideration of a service done, it is not a sufficient consideration; and Comyn's Digest, title "*Bargain and Sale*," b. 11, has been referred to in support of that position; but that learned writer does not lay it down as an express authority, or that it was his own positive opinion, for he states it under a *semble*, and refers to Dallison's Reports, p. 18. And if the case cited from that book be looked at, it is quite clear that it applies to mere gratuitous or voluntary services, which are not the subject of legal obligation. It has been further said, that some previous contract for the performance of the service should have been shewn; but we must now presume that the service done was a valuable service, and performed on an adequate consideration, and that the purparty or fourth part conveyed by the deed of 1672 was an equivalent for the considerations expressed in the conveyance."

Remarks upon *Gully* v. Bishop of *Exeter*.

In this case, it will be observed, the point decided was, not that the grantee in the deed in question was a purchaser entitled to take advantage of the vacating provisions in the statute, but that he was not a voluntary grantee whose title was liable to be superseded by the claim of a subsequent purchaser. The question, however, seems not to be essentially different, for the proposition that the grantee was not a volunteer within the intent of the second section, would generally (though perhaps not necessarily) involve the proposition that he was a purchaser for valuable consideration, within the intent of the statute. The converse of the proposition however is quite clear, for, of course, a person who has establish-

aforesaid, and the said [*second mortgagee*], and with the consent of the said [*vendor*], hath agreed to advance unto

terms assigned to trustees to secure the interest from tenant for life.

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ed his claim to the benefit of the vacating provision of the statute as purchaser, *a fortiori* would not himself be liable to be superseded by the claim of a subsequent purchaser. A case directly involving and exhibiting this distinction could only arise where there were three conveyances or settlements; the first clearly voluntary, the second of a doubtful character, the third for a consideration clearly valuable. If the parties interested under the second settlement could prove a valuable consideration entitling themselves to treat the first settlement as a nullity, they would necessarily establish their claim against the persons interested under the last settlement, whose title could only be made out by shewing *both* the prior settlements to be voluntary. But a case may be suggested in which it would be clear that the persons claiming under the second settlement had a good title against the grantee in the third settlement, though they could not overturn the first settlement; as, where the donee in the second settlement (supposing it to be voluntary,) sells for a valuable consideration before the settlor makes his third conveyance. It is clear, as will be shewn at large hereafter, that the purchaser would have a good claim against the donor's purchaser claiming under the third conveyance; while on the other hand it is also clear, and has been ruled, that a purchaser from a voluntary donee cannot avoid a prior voluntary settlement of the donor. See *Clerk* v. *Rutland*, Lane, 113, *ante*, p. 147. What, in such a state of facts, would be the effect of the third conveyance for valuable consideration upon the rights of the persons claiming under the respective prior settlements, is a perplexing question. If it avoided the first settlement, it would let in the claims of the purchaser from the donee under the second, unless it could be maintained that the purchaser under the third conveyance was entitled not only to avoid the first settlement, but to stand in the place of the donee, stepping over the intermediate grantee altogether; and if the donor's purchaser claiming under the third conveyance was prevented by the sale by the donee under the second settlement from nullifying the first, such sale would have the singular effect of supporting a prior voluntary settlement against the claim of a subsequent purchaser, being itself incapable of vacating the prior conveyance, or being vacated by the subsequent one. The consideration and solution of this difficulty are left to the ingenuity of the learned reader.

Mortgagees are purchasers *pro tanto*.

Mortgagees and lessees at rack-rent are purchasers *pro tanto*. With respect to the former, this appears from several cases stated under the first division of the present note, and might be illustrated by a reference to others. *Thorne* v. *Newman*, 2 Ch. Rep. 71; *S. C.* Finch, 38; *Jones* v. *Purefoy*, 1 Vern. 45; *Chapman* d. *Staverton* v. *Emery*, Cowp. 275, *ante*, p. 152; *Cormick* v. *Trapaud*, 6 Dow, 60.

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the said [*executors of first mortgagee*] the said several sums of money, amounting together to the sum of 1,700*l.*,

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Lessees.

An instance of the application of the principle to a lessee is afforded by the case of *Goodright* d. *Humphreys* v. *Moses*, 2 Bl. 1019, where A., and B. his wife, being seised in her right of lands of inheritance, in 1747 levied a fine declaring the uses to trustees, in trust that the rents might be applied for the maintenance of A. and B., and their children, during the life of A., and, after his decease, for the maintenance of B. and her children during the life of B., and, after their several deceases, in trust by sale or mortgage to raise 700*l.* for the younger children of A. and B., and, after raising the same, in trust to convey the residue of the premises to the right heirs of B. No leasing power was contained in the deed; B. survived her husband, and in 1759 demised the premises to the defendant for twenty-one years at a rent of 55*l. per annum.* After the death of B. the trustees brought an ejectment against the lessee, but the lease was held to be good. *De Grey*, Chief Justice, observed that the deed of 1747 was only a voluntary conveyance within the true meaning of the statute 27 Eliz. c. 4, being founded only upon a good, and not upon a valuable consideration; and therefore could not be set up against a *boná fide* purchaser; and that the defendant, being a lessee at rack-rent, was a *boná fide* purchaser of his term for a valuable consideration. See also *Doe* d. *Lewis* v. *Hopkins*, cited 9 East, 701. But the statute, it is presumed, cannot be brought in aid of a lease granted in professed execution of a power in a voluntary settlement, but which is void for non-compliance with the requisitions of the power; for it is not permitted to a person whose title is derived under a conveyance, to impeach it on the allegation that it was made with intent to "deceive" him.

Statute does not support leases void under powers.

The grantee of a rent-charge, or any other partial interest, being a purchaser to the extent of that interest, would be entitled to avoid, *pro tanto*, a preceding voluntary conveyance. *Douglasse* v. *Waad*, 1 Ch. Cas. 99.

Judgment creditor a purchaser *pro tanto*.

So, a creditor by judgment or statute is held to be a purchaser within the statute. Thus, in the case of *Girling* v. Lord *Lowther*, 2 Ch. Rep. 262, where Sir Thomas Leigh made a settlement on his two younger sons, and afterwards gave a judgment to secure the payment of 530*l.*, it was held that "the voluntary conveyance ought not to stand in the way to prevent satisfaction of a subsequent judgment for good considerations."

So of the conusee of a statute.

Again, in the case of *Garth* v. *Ersfield*, Bridgm. 22, on a *scire facias* to have execution of a recognizance, where the case was, that E., the defendant's father, made a feoffment to the use of himself for life, remainder to the defendant (the son) in tail, with divers remainders over, with power of revocation, and then, for the consideration of 400*l.*, entered into a recognizance to the plaintiff, and died; it was determined that the land was extendible against the son. And it was said, that, though the sta-

and unto the said [*second mortgagee*] the said sum of 250*l.*, respectively secured to them as aforesaid, upon having the

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tute did not speak expressly of conusees, it should be expounded to extend to them, for the statute had always received an equitable construction, to relieve purchasers.

Purchasers by marriage may take the benefit of the statute.

The statute, it will be observed, is not confined to purchasers *for money*, but extends to purchasers "for money *or other good consideration;*" which words clearly comprise all alienees *for value*, the word "good," as here used in association with "money," being evidently synonymous with *valuable;* which construction of course excludes alienees in consideration of natural love and affection alone, but extends to all purchasers within the consideration of a subsequent marriage. Thus, in the case of *Douglasse* v. *Waad*, 1 Ch. Cas. 99, where A., being then married, settled the manors of Buttles and Payton Hall to the use of himself for life, remainder to his first and other sons in tail; A. survived his wife, and married again; but, before his second marriage, in consideration of 1000*l.* portion, (which, however, was not proved to be paid), agreed to settle upon his second wife a jointure of 300*l.*, and to secure it upon certain lands, (of which it appeared that the manor of Buttles was to be part). A. died in the lifetime of his second wife, who now filed a bill against the son of A., to compel him to settle the jointure, and to set aside the first settlement made by A. as fraudulent; and though it was insisted that there could not be any intention of fraud against the second wife, and that the first settlement was by fine, and so notorious and upon record, yet the Court declared *that the marriage was a good consideration to make the wife a purchaser*, and decreed the settlement by A. to be set aside as fraudulent. And the decree was affirmed on a bill of review. See also *Kirk* v. *Clark*, Pre. Ch. p. 275; *post*, 171; *Gully* v. Bishop of *Exeter*, 2 Moore & Payne, 266, *ante*, p. 165.

Release of an adverse claim a sufficient consideration to make the grantee a purchaser.

It was lately held, that the release of an adverse claim to a litigated estate was a valuable consideration to support the grant of an advowson against a prior grant to the grantor's son, in consideration of natural love and affection, although the releasee was not party to the original suit, but came in by consent, and entered into an order of reference, and although he would not have been bound by the judgment in the original suit. *Hill* v. Bishop of *Exeter*, 2 Taunt. 69.

Purchasers should not take a collateral security against a voluntary settlement.

An important caution, to be observed by purchasers who venture to buy an estate with notice of a prior voluntary settlement, is, *never to take a collateral security against the claims of the persons deriving title under that settlement;* for, in two instances, this circumstance has been made a ground for supporting the settlement against the purchaser. Thus, in the case of *White* v. *Stringer*, 2 Lev. 105, where A., upon the marriage of his eldest son with B., and a portion paid by her, settled

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said several sums of 900*l.*, 350*l.*, 450*l.*, and 250*l.*, respectively secured by the said several hereinbefore-recited in-

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lands upon his first son and the heirs of his body by B., remainder to his second son in tail: A. three years afterwards sold the lands, and died; the eldest son died without issue:—and if the remainder to the second son was void against the purchaser, who had a covenant in his deed against all incumbrances except this remainder, against which remainder he had a collateral security, was the question. It was held, that the settlement was good against the purchaser; and one of the grounds of this determination was, that the purchaser not only had notice, *but had taken a collateral security against the remainder.*

So, in *Jennings* v. *Selleck*, 1 Vern. 466, where A. made a lease for ninety-nine years to his daughter, and afterwards sold this estate to the defendant, who, having notice of the lease, took a collateral security that the plaintiff should release within four years after she attained her age of twenty-one years; the Lord Chancellor decreed the possession and an account of profits to the daughter, observing, that the defendant, having purchased with notice of the lease, *and taken a collateral security*, must make the most of it.

As to the interference of equity.

Mr. Roberts, Volunt. Conv. p. 167, has referred these two cases to what it is conceived is their true principle:—that a purchaser, by resorting to a collateral security against a former voluntary conveyance or limitation, disavows his reliance on the statute, and impliedly affirms that which the statute enabled him to consider as void.

It must be remembered that the object of the statute is the protection of purchasers, and not the enabling persons to avoid their own voluntary alienations, though this has been its inevitable consequence. Hence has arisen the distinction, that equity will enforce the specific performance of a contract for sale, at the instance of a purchaser, though he bought with notice of a prior voluntary settlement; *Buckle* v. *Mitchell*, 18 Ves. 101; see also 1 Ves. & Bea. 180; *Leach* v. *Dean*, 1 Ch. Rep. 146; but will not compel the execution of such an agreement at the suit of the vendor; *Smith* v. *Garland*, 2 Mer. 123; *Johnson* v. *Legard*, 1 Turn. & Russ. 282, stated *ante*, p. 156; thus affording an instance of a contract existing between parties without reciprocity of obligation. But, though the Court will not enforce a contract, when its aid is asked by a vendor who has previously made a voluntary settlement of the property, yet, on the other hand, it will not grant an injunction to restrain the settlor from defeating the settlement by a sale; *Pulvertoft* v. *Pulvertoft*, 18 Ves. 84; and it should be noticed, that the pendency of a suit for carrying into effect the trusts created by a voluntary settlement, does not interfere with the settlor's power to sell. *Metcalfe* v. *Pulvertoft*, 1 Ves. & Bea. 180; Sugd. Vend. & Purch. 668.

dentures, and the interest henceforth to become due in respect of the same respectively, assigned unto the said [*trus-*

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Fourthly.—As to the effect of third persons acquiring an interest as purchasers in the estates created by a voluntary settlement. Hitherto, the operation of the statute has been considered merely in relation to the conflicting claims of a voluntary donee and a purchaser. It is now to be viewed in another light, namely, where the contest lies not between a volunteer and a purchaser, but between two purchasers, the one deriving his title from the donee, and the other from the donor. Here, the great principle on which the statute is founded, the security of purchasers, restrains with the same force that it urges its application, since the protection of a purchaser is as much involved in the preservation as in the destruction of the voluntary estate. In such a case, the superiority of the title of the respective purchasers is simply referable to the fact of priority; for it is a settled rule, that if, *before* any act of disposition on the part of the settlor, the voluntary donee sells the settled estate, the title of such purchaser from him is not liable to be defeated by the subsequent sale of the donor.

Effect of sale by donee in supporting voluntary settlement.

And so far has this principle been carried, that it has been decided, that, if a third person has married the donee on the faith of the ownership derived under the voluntary settlement, though without any contract for a specific interest in the property, this will support the settlement against a subsequent purchaser from the settlor.

Marriage of donee will sustain a settlement, when.

The leading authority for this doctrine is the case of *Prodgers* v. *Langham*, 1 Sid. 133, which was as follows:—A., being seised in fee of lands in the county of N., made a lease of his lands to B. and C., in trust for his only daughter for twenty-one years, to the intent that the profits might be applied to her maintenance until her marriage, and, after her marriage (subject to a condition which she complied with), then in trust for her during the residue of the term; the daughter married the plaintiff. The Court held in this case, 1st, that the conveyance to the daughter was a voluntary conveyance, and would have been void as against the defendant, a subsequent purchaser for valuable consideration, within the statute of fraudulent conveyances, if the marriage had not intervened; but, 2nd, that, although the conveyance was void in its creation as to purchasers, yet, when the marriage took effect, the first settlement remained no longer voluntary, as it was in its creation, but became supported by a valuable consideration, and by consequence unimpeachable, *inasmuch as the marriage was an advancement of the daughter, and he who married her was induced thereto by the prospect of this provision.* So, in the case of *Kirk* v. *Clark*, Prec. Cha. 275, where A., tenant for life of copyhold lands, with the remainder to his wife for life, the reversion to himself in fee, made a surrender of the reversion to his eldest son in tail, the remainder to his own right heirs; which surrender was made to his son, with intent

Effect of marriage of donee, which was induced by the ownership under the settlement.

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tees of term], their executors, administrators, and assigns, *In trust* for the said [*purchaser*], and to the intent that the

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only to lessen the fine he would have paid in case the reversion had come to him by descent from his father. Afterwards, upon a marriage between the son and a young lady, who had 2000*l.* for her portion, articles were made for the settlement of a leasehold estate, and the copyhold would have been included in the articles if the father had not assured the lady's friends that he had settled that already on his son. On a second marriage of the father, he covenanted to settle the copyholds, and the wife and her trustees now filed a bill to compel a specific performance of those articles. The argument on which the plaintiff's counsel relied was, that the settlement on the son was purely voluntary, having been made long before any treaty of marriage had begun, and was therefore fraudulent and void against a purchaser for valuable consideration without notice, as the plaintiff in that case was by her marriage; and the rather because the agreement in writing comprised only the leasehold estate, the copyhold estate having been settled long before, and at a time when there was no prospect of the son's marrying. It was argued on the other side, that this ought not to be looked upon as a voluntary and fraudulent settlement as against the plaintiff, because it was the chief inducement that prevailed with the friends of the son's wife to consent to the marriage, and to bestow upon her the portion which she brought with her; and that, if they had not been assured that the copyhold was already settled on the son, they would have insisted upon a settlement, or refused the portion. Lord Chancellor *Cowper* held the surrender to the son to be good, declaring, that, though it was at first voluntary, yet that, upon the treaty of marriage, it being regarded as the principal inducement thereto, it became valuable, and ought to be considered as if it were but then surrendered to the son. It was not necessary to insert the estate in the articles, it being already settled.

This principle has been recognised in several other cases. Thus, in *East India Company* v. *Clavel*, Prec. Chan. 377, a settlement for securing a portion of 5000*l.* for the settlor's daughter was established against a bond creditor, on the ground that the settlement, though voluntary in its creation, was the motive and inducement to J. S. to marry her, and therefore had now become valuable.

So, in the case of *Wilson* v. *Wormall*, Godbolt, 161, *Coke*, C. J., laid it down, that, if lessee for years assign over his term by fraud, to defeat the execution, and the assignee assigneth the same over unto another, *bonâ fide*, it is not, in the hands of the second assignee, liable to execution.

Again, in *Newport's* case, Skin. 423, it was objected to the claim of the transferee of a mortgage, that it did not appear that any money was paid upon the original mortgage, and therefore it was fraudulent; and being

same may be respectively kept on foot as subsisting charges upon the said purchased hereditaments; and that the said [*purchaser*], his executors, administrators, and assigns may be authorized and enabled to recover and receive the interest henceforth during the life of the said [*tenant for life*] to become due and payable upon or in respect of the same sums respectively. NOW THIS INDENTURE WITNESSETH, that, in consideration of the sum of 1,700*l.* of lawful money of Great Britain and Ireland, to the said [*executors*

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Testatum.

Executors of first mortgagee

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fraudulent in the creation, the subsequent payment of a valuable consideration by the transferee did not purge the fraud against the defendant, who was a purchaser for valuable consideration. *Sed, per Holt*, C. J., the first mortgage was good between the parties; and being so, when the first mortgagee assigns for a valuable consideration, this is all one as if the first mortgage had been upon a valuable consideration, for now the second mortgagee stands in his place.

Observations upon the cases.

The doctrine of the preceding cases, it is obvious, enables a voluntary alienee, by immediately disposing of the estate for a valuable consideration, to defeat the donor's power to over-reach his own voluntary disposition by means of a sale; and it shews, moreover, the danger of purchasing from a person who has made a prior voluntary settlement, the limitations of which, though apparently void against a purchaser, might have acquired an indestructible character from transactions *ex post facto*, (see Lord *Eldon's* judgment in *Johnson* v. *Legard*, 1 Turn. & Russ. 282), even supposing that it is well ascertained that the settlement was originally voluntary, in regard to which, it must be remembered that a settlement may, in point of fact, be supported by a valuable consideration, notwithstanding the absence of any *apparent* consideration; for, parol evidence would be admissible to support the deed and rebut the supposed fraud. See Sugd. Vend. & Purch. 8th ed. 660. Thus, a post-nuptial settlement may have been accompanied by the payment of a portion on the part of the wife, which did not appear on the face of the deed, or it might prove to have been made in pursuance of articles before marriage, to which no reference is made. *Ferrars* v. *Cherry*, 2 Vern. 384.

The reader, who wishes to pursue farther inquiries into the law respecting voluntary conveyances, will do well to peruse Mr. Roberts's Treatise on the subject, where most of the points discussed in the present note, and many others collaterally connected with it, are treated of very fully, and in a manner creditable to the industry and abilities of its respectable author. Some branches of the subject, particularly that which relates to deeds creating trusts for the payment of debts, have been omitted in the present article, because they will more conveniently find a place in the subsequent title.

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of first mortgagee], as executors as aforesaid, paid by the said [*purchaser*] at or before the sealing and delivery of these presents, the receipt whereof the said [*executors of first mortgagee*] do hereby respectively acknowledge, and from the same do release and discharge the said [*purchaser*], his executors, administrators, and assigns, for ever, by these presents; the said [*executors of first mortgagee*], with the consent of the said [*vendor*], and by the direction of the said [*purchaser*], testified by their severally executing these presents, *Have*, and every of them *Hath*, bargained, sold, assigned, transferred, and set over, and by these presents *Do*, and every of them *Doth*, &c., unto the said [*trustees of term*], their executors, administrators, and assigns, ALL THOSE the said several sums of 900*l.*, 350*l.*, and 450*l.*, respectively secured to or for the benefit of the said [*first mortgagee*], in and by the said recited indentures of the twenty-fourth day of June, 1810, the twenty-second day of February, 1816, the tenth day of July, 1816, and the twenty-third day of December, 1816, as hereinbefore mentioned, and the full benefit and advantage thereof, and the interest henceforth to become due and payable upon or in respect of the same; And all the right, interest, property, claim, and demand whatsoever of the said [*executors of first mortgagee*] respectively in, to, and out of the same sums of money respectively, and interest, together with all powers, remedies, and means whatsoever requisite and necessary for the suing for, recovering, receiving, and giving effectual discharges for the same sums of money respectively; TO HAVE, RECEIVE, AND TAKE the said several sums of money, interest, and premises expressed to be hereby bargained, sold, and assigned unto the said [*trustees of term*], their executors, administrators, and assigns, In trust nevertheless for the said [*purchaser*], his executors, administrators, and assigns, and to be assigned and disposed of as he or they shall, from time to time, direct or appoint. AND THIS INDENTURE FURTHER WITNESSETH, that, in consideration of the sum of 250*l.* of lawful money of Great Britain and Ireland to the said [*second mortgagee*] paid by the said [*purchaser*] at or before the sealing and delivery of these presents, the receipt whereof the said [*second mortgagee*] doth hereby acknowledge, and from the same doth release and discharge the said [*purchaser*], his executors, administrators, and assigns, for ever,

assign to trustees for purchaser—

—Mortgage debts.

And all the right, &c.

Habendum

To trustees

in trust for purchaser.

Second *testatum*.

Second mortgagee assigns his mortgage debt.

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by these presents, the said [*second mortgagee*], with the consent of the said [*vendor*], and by the direction of the said [*purchaser*], testified as aforesaid, *Hath* bargained, sold, assigned, transferred, and set over, and by these presents *Doth* &c., unto the said [*trustees of term*], their executors, administrators, and assigns, All that the said sum of 250*l.* secured by the said recited indenture of the tenth day of October, 1820, as hereinbefore mentioned, and the full benefit and advantage thereof, and the interest henceforth to become due and payable upon or in respect of the same, And all the right, interest, property, claim, and demand whatsoever of the said [*second mortgagee*], in, to, and out of the same sum of money and interest, Together with all powers, remedies, and means whatsoever requisite and necessary for the suing for, recovering, receiving, and giving effectual discharges for the same sum of money; TO HAVE, RECEIVE, AND TAKE the said sum of money, interest, and premises lastly expressed to be hereby bargained, sold, and assigned, unto the said [*trustees of term*], their executors, administrators, and assigns, In trust nevertheless for the said [*purchaser*], his executors, administrators, and assigns, and to be assigned and disposed of as he or they shall from time to time direct or appoint. AND THIS INDENTURE FURTHER WITNESSETH, that, in consideration of the premises, and of the sum of 10*s.* of lawful money of Great Britain and Ireland to the said [*executors of first mortgagee*] paid by the said [*trustees of term*], at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, the said [*executors of first mortgagee*], with the consent of the said [*vendor*], and by the direction of the said [*purchaser*], testified as aforesaid, *Have*, and every of them *Hath* bargained, sold, assigned, transferred, and set over, And by these presents *Do* &c., unto the said [*trustees of term*], their executors, administrators, and assigns, *All and singular* the messuage, barton, farm, lands, mills, tenements, tithes, and other the hereditaments comprised in the said recited indenture of the twenty-fourth day of June, 1810, and hereinafter described, with their respective rights, members, and appurtenances, And all the estate, right, title, interest, property, claim, and demand whatsoever of the said [*executors of first mortgagee*] respectively, in, to, and out of the same; TO HAVE AND TO

Habendum

To trustees in trust for purchaser.

Third *testatum.*

Executors of first mortgagee assign mortgaged hereditaments.

Habendum.

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To trustees for remainder of said term of 500 years, subject to redemption.

HOLD the said messuage, barton, farm, lands, mills, tenements, tithes, hereditaments, and premises hereby bargained, sold, and assigned, or expressed and intended so to be, unto the said [*trustees of term*], their executors, administrators, and assigns, henceforth for and during all the rest, residue, and remainder of the term of five hundred years granted and demised, or expressed to be granted and demised by the said indenture of the twenty-fourth day of June, 1810, and for all other the estate, term, and interest of the said [*executors of first mortgagee*], *Upon trust* for the said [*purchaser*], his executors, administrators, or assigns, subject nevertheless to such right and equity of redemption, as the same premises are now subject and liable to, upon payment as well of the said several sums of 900*l.*, 350*l.*, and 450*l.*, and the interest thereof respectively, as of the said sum of 250*l.*, and the interest thereof. PROVIDED ALWAYS, and it is hereby agreed and declared, that if, at the decease of the said [*tenant for life*], the said [*purchaser*], his executors, or administrators, shall be beneficially entitled to the said several sums of 900*l.*, 350*l.*, 450*l.*, and 250*l.*, respectively, and the absolute interest therein respectively, and the said [*purchaser*], or his heirs, shall be seised of or beneficially interested in the equity of redemption, and the reversion and remainder in fee-simple of the said messuage, barton, farm, lands, mills, tenements, tithes, hereditaments, and premises hereinbefore bargained, sold, and assigned, or expressed and intended so to be, then, from and after the decease of the said [*tenant for life*], and as between the real and personal representatives of the said [*purchaser*], the said [*trustees of term*], their executors, administrators, and assigns, shall stand possessed of and interested in the said messuage, barton, farm, lands, mills, tenements, tithes, hereditaments, and premises, for the then residue of the said term of five hundred years therein, and of and in the said several sums of 900*l.*, 350*l.*, 450*l.*, and 250*l.*, respectively, and the interest thereof respectively, In trust for and by way of protection to the said [*purchaser*] and his heirs, and to be from time to time assigned and disposed of as he or they shall direct or appoint, and in the meantime to attend, wait upon, and go along with the reversion, freehold, and inheritance of the same hereditaments, in order to preserve the same from all mesne charges and

Declaration that mortgages shall attend the inheritance after the death of the tenant for life;

In trust for purchaser, and to attend the inheritance.

incumbrances, if there should be any such. *(Covenant by executors of first mortgagee that they have not incumbered).* AND THIS INDENTURE FURTHER WITNESSETH, that, in pursuance of the said recited contract for the purchase of the said reversion or remainder of and in the said messuage, barton, farm, lands, mills, tenements, tithes, and hereditaments, subject as aforesaid, and in consideration of the sum of £——, of lawful money of Great Britain and Ireland, to the said [*vendor*] in hand well and truly paid by the said [*purchaser*], at or before the sealing and delivery of these presents, the receipt of which said sum of £—— the said [*vendor*] doth hereby acknowledge, and from the same doth release and discharge the said [*purchaser*], his heirs, executors, administrators, and assigns for ever by these presents, And also in consideration of the sum of 10*s.* of lawful money aforesaid, to the said [*trustee for first mortgagee*] in hand paid by the said [*purchaser*], at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, he the said [*trustee for first mortgagee*], at the request and by the direction of the said [*executors of first mortgagee*], [*second mortgagee*], and [*vendor*], (testified by their severally executing these presents), *Hath* bargained, sold, and released, and by these presents *Doth*, &c., And to the intent that the residue now unexpired of the said term of one thousand years, so granted or demised to the said [*second mortgagee*] as hereinbefore mentioned, may be merged or otherwise extinguished in the reversion and inheritance of the said hereditaments and premises therein comprised (*f*),

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Further *testatum.*

In consideration of purchase-money, and for nominal considerations, trustee for first mortgagee, (by the direction of executors and vendor), and second mortgagee, to the intent that his term may merge, surrenders,

(*f*) This is a mere equitable term, the whole legal inheritance having been vested in the trustee for the first mortgagee, and therefore no object would have been answered by keeping it on foot. In truth, there being no legal term in the surrenderor, the deed is inoperative as a surrender properly so called; but the taking a surrender of such an interest accords with the frame of the mortgage-deed, which assumed the form of an actual demise or lease and not of a mere contract or agreement to charge only, which is its real nature, and is consistent moreover with the general system of conveyancers in transferring equitable interests by the modes of assurance adapted to legal estates of the same quantity. Thus, it is in every day's practice for

Remark upon the surrender.

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he the said [*second mortgagee*], at the request and by the direction of the said [*vendor*] and [*purchaser*], (testified &c.), *Hath* bargained, sold, assigned, surrendered, and yielded up, And by these presents *Doth* &c.; And the said [*vendor*] *Hath* granted, bargained, sold, released, and confirmed, and by these presents *Doth* &c., unto the said [*purchaser*], (in his actual possession now being, by virtue of a bargain and sale to him thereof made by the said [*trustee for first mortgagee*] and [*vendor*], in consideration of *5s.*, by indenture bearing date the day next before the day of the date of these presents, for one year, commencing from the day next before the day of the date of the same indenture of bargain and sale, and by force of the statute made for transferring uses into possession), and to his heirs, ALL THAT the capital messuage, barton, farm, and demesne lands, commonly called or known by the name of ——, with the appurtenances, and all those the grist mills, commonly called or known by the name of —— mills; All which said premises are situate and lying in the parish of ——, otherwise ——, in the said county of ——; And all and singular that one tenement, fields, closes, and parcels of land, and other the premises called or commonly known by the name of ——, also situate, lying, and being within the said parish of ——; and also the tithe sheaf or tenth of all corn and grain arising, renewing, or growing on the said —— farm and demesne lands of ——, and also on all and singular the aforesaid tenement, closes of land, and other premises, called ——; Together with all houses, outhouses, edifices, buildings, barns, stables, courts, curtilages, gardens, orchards, lands, meadows, pastures, feedings, woods, underwoods, commons, and common of pasture, ways, paths, passages, waters, watercourses, royalties, privileges, jurisdictions, profits, commodities, advantages, and hereditaments whatsoever to the said messuage,

Parcels.

Houses, &c.

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the mortgagee of an equitable inheritance, on the satisfaction of the debt, to execute indentures of lease and release, professedly to reconvey the estate, and for the mortgagee of an equitable term to execute a deed of surrender; though in both these instances the deeds operate merely as a discharge from the equitable lien or contract created by the mortgage, for which purpose a receipt in full for the mortgage money would be equally effective.

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barton, farm, lands, mills, tenements, tithes, hereditaments, and premises belonging or in anywise appertaining, or now or at any time heretofore accepted, reputed, or taken, used, occupied, or enjoyed, to or with the same, or any part thereof, as part, parcel, or member thereof; And the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of the said premises, and every part thereof; And all the estate, right, title, interest, use, trust, inheritance, benefit, property, claim, and demand whatsoever, both at law and in equity, of them the said [*trustee for first mortgagee*], [*second mortgagee*], and [*vendor*], and every or any of them, in, to, and out of the said messuage, barton, farm, lands, mills, tenements, tithes, hereditaments, and premises, and every or any part or parcel thereof, with the appurtenances; And all deeds, evidences, and writings in the hands, custody, or power of them the said [*trustee for first mortgagee*], [*second mortgagee*], and [*vendor*], or any of them, or which they or any of them can obtain or procure without suit at law or in equity; To HAVE AND TO HOLD the said messuage, barton, farm, lands, mills, tenements, tithes, hereditaments, and all and singular other the premises hereinbefore described and expressed to be hereby granted and released, with their and every of their appurtenances, unto the said [*purchaser*] and his heirs, for ever; Nevertheless, To THE USE of the said [*trustees of term*], their executors, administrators, and assigns, henceforth, during the residue now to come and unexpired of the aforesaid term of five hundred years, granted or demised, or expressed and intended to be granted or demised by the said indenture of the twenty-fourth day of June, 1810, as aforesaid, and by way of corroboration and confirmation of the same, and subject to such right and equity of redemption as aforesaid, upon payment of the said principal sums of 900*l.*, 350*l.*, 450*l.*, and 250*l.* respectively, and the interest thereof respectively, under the proviso aforesaid; and after the end or sooner determination of the said term of five hundred years, and in the meantime subject thereto, To THE USE of the said [*tenant for life*] and her assigns, during the term of her natural life, without impeachment of waste; and from and after her decease, *To uses to prevent dower in favour of the purchaser. (Covenant by trustee for first mortgagee, and second mort-*

Reversion, &c.

Estate, &c.

Deeds, &c.

Habendum.

To purchaser in fee.

Nevertheless to said trustees for the remainder of said term of 500 years.

—Subject to equity of redemption.

Remainder.

To the use of tenant for life.

Remainder to uses in favour of purchaser.

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gagee, that they have not incumbered). And the said [*vendor*] doth hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said [*purchaser*], his appointees, heirs, and assigns, in manner following, (that is to say), that, notwithstanding any act, deed, matter, or thing whatsoever, made, executed, done, or suffered by the said [*vendor*], or the said [*tenant for life*], or [*former owner*] (*g*) respectively, to the contrary, the said [*trustee for first mortgagee*], [*second mortgagee*], and [*vendor*], some or one of them, now at the time of the sealing and delivery of these presents, have or hath in themselves or himself good right, full power, and lawful and absolute authority, to grant, release, surrender, and assure the messuage, barton, farm, lands, mills, tenements, tithes, hereditaments, and premises, with their appurtenances, expressed to be hereby granted and released, To the uses and in manner hereinbefore mentioned, and according to the true intent and meaning of these presents; *And further*, that it shall be lawful for the said [*purchaser*], his appointees, heirs, and assigns, from time to time, and at all times after the decease or sooner determination of the estate for life of the said [*tenant for life*], to hold and enjoy the said messuage, barton, farm, lands, mills, tenements, tithes, hereditaments, and premises, without any interruption or disturbance whatsoever, of, from, or by the said [*vendor*], or of, from, or by any other person or persons whomsoever, claiming through, under, or in trust for him, or through, under, or in trust for the said [*tenant for life*] and [*former owner*], deceased, respectively, other than and except the person or persons whose estate or interest, or several estates or interests, is or are hereinafter excepted, for or in respect of the same estate and interest, or several estates and interests; And that free and clear, and freely, clearly, and absolutely acquitted, exonerated, and discharged, or otherwise by the said [*vendor*], his heirs, executors, or administrators, well

Covenant by vendor, that conveying parties have right to convey.

For quiet enjoyment.

Free from incumbrances.

(*g*) As the vendor derived the property from his mother, (the present tenant for life), who entered into no covenants for title with him, the conveyance being merely voluntary, it seems proper that the covenants of the vendor for the title should extend to her acts; and since the mother was the donee of the preceding owner, it seems proper, for the same reason, that they should extend to his acts also.

RELEASE IN FEE, ON THE PURCHASE OF A REMAINDER, AND TRANSFER OF MORTGAGES.

and sufficiently saved and kept harmless and indemnified of, from, and against all and all manner of former and other estates, titles, charges, and incumbrances whatsoever, made, done, committed, occasioned, or executed by the said [*vendor*], or by any person or persons whomsoever, claiming through, under, or in trust for the said [*tenant for life*] and [*former owner*] respectively, deceased, or by or through their, or any, or either of their acts, defaults, means, privity, or procurement, Save and except a certain indenture of lease, bearing date the thirteenth day of October, in the year of our Lord 1819, and made between the said [*donor*], of the first part; the said [*first mortgagee*], and [*trustee for first mortgagee*], of the second part; and [*lessee*], therein described, of the third part; whereby the said messuage, barton, and farm, with the appurtenances called ——, (except certain parts thereof in the said lease excepted), were demised to the said [*lessee*], his executors, administrators, and assigns, for a term of fourteen years from Lady-day then next, at and under the yearly rent of £——, payable quarterly, and under divers covenants and conditions in the same indenture of lease contained; *And moreover*, that the said [*vendor*] and his heirs, and all and every person and persons claiming any estate, right, title, or interest in, to, or out of the said hereditaments and premises, or any of them, through, under, or in trust for the said [*tenant for life*] and [*former owner*] respectively, shall and will from time to time, and at all times hereafter, upon every reasonable request, and at the costs and charges of the said [*purchaser*], his appointees, heirs, or assigns, make, do, acknowledge, levy, suffer, and execute, or cause and procure to be made, done, acknowledged, levied, suffered, and executed, All such further acts, deeds, matters and things, conveyances and assurances in the law whatsoever, for the more effectually granting, releasing, and assuring the said hereditaments and premises with their appurtenances, subject to the life estate of the said [*tenant for life*] if subsisting, unto and to the use of the said [*purchaser*], his appointees, heirs, and assigns, or otherwise as he or they shall direct or appoint, As by the said [*purchaser*], his appointees, heirs, or assigns, or his or their counsel in the law, shall be reasonably advised or devised and required, so that such further assurance &c., *ut ante*, p. 29. IN WITNESS, &c.

Exception of a lease at rack rent.

And for further assurance.

IN CONSIDERATION OF FEE-FARM RENT.

RELEASE *in* FEE, *in Consideration of a perpetual* RENT-CHARGE *issuing out of the Lands, which is limited to* USES *to* PREVENT DOWER *in favour of the Vendor* (*a*).

Parties.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*vendor*], of &c., of the first part; [*vendor's trustee,*] of &c., of the second part; [*purchaser*], of &c., of the third part; and [*purchaser's trustee*], of &c., of the fourth part. *(Recite deeds of conveyance limiting the property, with other hereditaments, to the ordinary uses, to prevent dower, in favour of the vendor).*

Recital of contract for conveyance.

AND WHEREAS the said [*vendor*] hath contracted and agreed with the said [*purchaser*] to convey and assure to him the piece or parcel of ground and hereditaments hereinafter described, and hereby intended to be appointed and released, for an estate of inheritance in fee-simple, free from all incumbrances, in consideration of the annual sum or yearly rent-charge hereinafter

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As to the expense of the deed, where lands are sold in consideration of a rent-charge.

(*a*) Where lands are sold in consideration of a rent issuing out of them for the benefit of the vendor, it should always be stipulated by whom the expense of the conveyance is to be borne; for, as the vendor takes an interest under the limitations, it does not follow that the rule which throws this expense upon the purchaser in ordinary cases, would apply to this. A question also frequently arises between the solicitors of the respective parties to a conveyance of this nature, as to which of them is entitled to prepare the deed, it being of an amphibious character, partly in the nature of a purchase-deed, which it is well known is always prepared by the purchaser's solicitor, and partly of a lease, which is invariably prepared by the lessor's solicitor. The object of the rule which assigns to a purchaser the expense of preparing his conveyance, and to his solicitor the task of preparing, must have been that the purchaser may mould his conveyance in his own way; but in the present instance, as the vendor also takes an interest in the property, namely, the rent, the limitation of which he must wish to regulate, the reason applies equally to him. In such cases it seems fair that the expense should be borne by the parties equally, and the business jointly transacted by the solicitors.

limited to the use of or in trust for the said [*vendor*], his appointees, heirs, and assigns; And also in consideration of the said [*purchaser*] entering into the covenants hereinafter contained. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said recited contract, and in consideration of the annual sum or yearly rent-charge of £——, hereinafter limited to uses for the benefit of the said [*vendor*], his appointees, heirs, and assigns, to be issuing and payable out of the piece or parcel of ground and hereditaments hereinafter described, and hereby intended to be appointed and released, and of the powers and remedies hereby reserved for enforcing the payment of the same; And also in consideration of the covenants on the part of the said [*purchaser*] hereinafter contained, he, the said [*vendor*], by virtue of the hereinbefore recited power, and of every other power enabling him in this behalf, *Doth*, by these presents, direct, limit, and appoint, that the piece or parcel of ground and hereditaments hereinafter described, and hereby intended to be released, shall henceforth remain, continue, and be *To the uses*, upon the trust, and for the intents and purposes hereinafter expressed and declared concerning the same. AND THIS INDENTURE FURTHER WITNESSETH, that, for the considerations hereinbefore expressed, and by way of auxiliary assurance only, And also *(nominal pecuniary consideration)*, he, the said [*vendor*], *Hath* granted, bargained, sold, and released, and by these presents *Doth* grant &c., unto the said [*purchaser*] and his heirs, (in the actual possession, &c.); *(describe parcels, adding general words)*; And all the estate, &c.; And all deeds, &c (*b*). TO HAVE AND TO HOLD the said piece or parcel of ground and hereditaments hereinbefore

IN CONSIDERATION OF FEE-FARM RENT.

Testatum.

In consideration, &c., vendor appoints to the uses after mentioned.

Further *testatum*.

Vendor grants to purchaser.

Habendum.

(*b*) In such a case as the present, the deeds are commonly delivered to the grantee of the land; but it seems proper that the grantor, who, as the *cestui que use* of the rent, retains an interest in the property, should have a covenant for their production. Sometimes, indeed, the deeds are left in the hands of the vendor, who covenants to produce them to the purchaser; and this, of course, is done where they relate to other property. In such a case, a memorandum of the present deed should be indorsed on the deed of conveyance vesting the property in the vendor, or the person from whom he derived his title; because, where a person is allowed to hold a deed which makes him the ostensible owner of a larger estate than, according to the existing facts, belongs to him, it is always proper to in-

As to custody of the title-deeds.

IN CONSIDERATION OF FEE-FARM RENT.

described, and other the premises hereby intended to be released or otherwise assured, with their appurtenances, to the uses, upon the trusts, and for the intents and purposes hereinafter expressed concerning the same, (that is to say),

To the intent that a yearly rent-charge shall issue.

to the use, intent, and purpose that an annual sum, or yearly rent-charge of £——, to be payable and paid as hereinafter mentioned, clear of and free from all charges and deductions whatsoever on account of taxes or otherwise, may henceforth and for ever hereafter issue out of the said piece or parcel of ground, hereditaments, and premises hereinbefore described and hereby intended to be appointed and released, and be received and taken by the person or persons for the time being entitled to the said annual sum or yearly rent-charge, under or by virtue of the uses hereinafter expressed and declared concerning the same, such annual sum or yearly rent-charge to be payable and paid in even and equal portions quarterly, on the twenty-fifth day of March, the twenty-fourth day of June, the twenty-ninth day of September, and the twenty-fifth day of December in every year, the first quarterly payment to be made on the twenty-fifth day of March next. AND TO THIS FURTHER USE, intent, and purpose, that, so often as any quarterly payment of the said annual sum or yearly rent-charge of £——, or any part there-

Power of distress.

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dorse upon the deed some notice of the subsequent transactions which have curtailed or qualified his estate, in order to preclude the possibility of any improper use being made of the deed. Attention to this precaution would often prevent fraud. The most frequently occurring cases to which it is applicable are, where a person who has once been absolute owner of property afterwards holds the deeds in the character of mortgagee; and also, where a man, being seised in fee of lands, settles them, upon his marriage, to uses, under which he takes an estate for life only. In this case, the custody of the deeds belongs to him, as the owner of the immediate freehold. Unless, in both these instances, a memorandum of the subsequent deed, which restricts the absolute ownership of the holder of the deeds, be indorsed on the deed of conveyance under which that ownership is derived, the power is most improperly left in the hands of such person, of dealing with the property as his own inheritance, to the injury, perhaps ruin, of an innocent purchaser, who becomes the victim of a fraud against which no vigilance or circumspection could have protected him, since the possession, in both cases, might, and in that of the tenant for life in all probability would, be consistent with the representation of absolute ownership.

of, should be behind and unpaid by the space of fourteen days next after any or either of the days or times appointed for payment thereof as aforesaid, it shall be lawful for the person or persons for the time being entitled to the same annual sum or yearly rent-charge, under or by virtue of the uses or limitations hereinafter expressed concerning the same, into and upon the said piece or parcel of ground, hereditaments, and premises, or any part thereof, to enter and distrain for the same annual sum or yearly rent-charge, and all arrears thereof; and the distress and distresses then and there found to take, drive, carry away, and impound, and the same in pound to detain, and in due time to appraise and sell, or otherwise to act therein according to due course of law, in the same manner as landlords are authorized to do in respect to distresses for arrears of rent upon leases for years; to the intent, that thereby and therewith the person or persons for the time being entitled as aforesaid, shall be fully paid and satisfied the said annual sum or yearly rent-charge of £——, or so much thereof as shall then remain due and unpaid, and all costs and expenses whatsoever occasioned by the non-payment thereof. AND TO THE FURTHER USE, intent, and purpose that, so often as any quarterly payment of the said annual sum or yearly rent-charge, or any part thereof, shall be behind and unpaid by the space of twenty-eight days next after any of the said days or times appointed for the payment thereof as aforesaid, although no formal demand thereof shall have been made, it shall be lawful for the person or persons for the time being entitled to the said annual sum or yearly rent-charge, under or by virtue of the uses or limitations hereinafter expressed and declared concerning the same, into and upon the said piece or parcel of ground, hereditaments, and premises, or any part thereof in the name of the whole, to enter, and the same to hold and enjoy, and the rents and profits thereof to receive and take, for his, her, and their own use and benefit, until he, she, or they shall be thereby, or therewith, or otherwise, fully paid and satisfied all arrears of the said annual sum or yearly rent-charge, and also so much of the said annual sum or yearly rent-charge as shall accrue and grow due during such time as the person or persons for the time being entitled as aforesaid shall continue in possession of the said piece or parcel of ground, hereditaments, and premises, after such entry as aforesaid; together

IN CONSIDERATION OF FEE-FARM RENT.

Power of entry.

IN CONSIDERATION OF FEE-FARM RENT.

with all such damages, costs, and expenses whatsoever as shall be occasioned by reason of the non-payment thereof, or of any part thereof, at or on the days appointed for the payment thereof as aforesaid; and such possession, when taken, to be without impeachment of waste; And as to the said piece or parcel of ground, hereditaments, and premises hereby appointed and released, or intended so to be, (charged with the said annual sum or yearly rent-charge of £——) (*c*), To THE USE of the said [*purchaser*] and his assigns, during his natural life, without impeachment of waste; And after the determination of that estate by any means in the lifetime of the said [*purchaser*] (*d*), To THE USE of the said [*trustee*], his executors or administrators, during the life of the said [*purchaser*], *In trust* for him and his assigns; And after the determination of the several estates hereinbefore limited, To THE USE of the said [*purchaser*], his heirs and assigns for ever, and to, for, or upon no other use, trust, end, intent, or purpose whatsoever. *And it is hereby declared and agreed* by and between the said parties to these presents, that the said annual sum or yearly rent-charge of £—— hereinbefore limited, shall enure, remain, and be to the uses, upon the trust, and for the intents and purposes hereinafter declared concerning the

Declaration of the uses of the land.

Declaration of the uses of the fee-farm rent.

(*c*) If the lands are in lease, a term of years should be limited to a trustee for the vendor, (*ut ante*, p. 25), which would carry the rent accruing under the demise, during which the powers of distress and entry would be inoperative.

Mode of limitation, where the purchaser covenants to pay a fee-farm rent.

(*d*) It is usual, where lands are conveyed to a purchaser, subject to a rent, which he covenants to pay, to make the conveyance to him simply in fee, or, at all events, to him for life, with an interposed remainder for his life to a trustee, and then to him in fee, for the purpose of preventing dower, as in the text, but without giving the purchaser any power of appointment; because the appointee of the land claiming under an appointment made by virtue of that power, would not be personally bound by the covenant to pay the rent entered into by the donee of the power, as the appointee is *in* under the deed creating the power, and not under the donee. This point was decided in the case of *Roach* v. *Wadham*, 6 East, 289, stated *ante*, Vol. 4, p. 283, where it was assumed, that if the defendant had been the grantee of the estate of the covenantor, he would have been bound by the covenant. And the same consequence, it is conceived, would have followed, if the covenanting donee of the power had been made the releasee to uses. *Vide ante*, Vol. 7, p. 512.

same; (that is to say), To such uses, upon such trusts, for such estate or estates, and subject to such powers, provisoes, and declarations, and for such intents and purposes as the said [*vendor*] shall at any time or times hereafter, or from time to time, by any deed or deeds direct or appoint; and, in default of such direction or appointment, To THE USE of the said [*vendor*] and his assigns, during his natural life; And from and after the determination of that estate by any means, in his lifetime, To THE USE of the said [*vendor's trustee*] and his heirs, during the life of the said [*vendor*], *In trust* for him and his assigns; and from and immediately after the determination of the estate hereinbefore limited in use to the said [*trustee*] and his heirs (*e*), To THE USE of the

IN CONSIDERATION OF FEE-FARM RENT.

Uses to prevent dower.

(*e*) The long debated question, whether a rent granted *pur auter vie*, without words of limitation, belongs to the executor or administrator, under the statute of frauds, or becomes extinguished, for the benefit of the owner of the land, has lately been decided in the case of *Bear-park* v. *Hutchinson*, 7 Bing. 179, which was an action of replevin to a distress levied by the administrator of the owner of a yearly rent-charge of 60*l.*, which was granted to the intestate, (without words of limitation), *during the life of B.*, who was yet living. It was held, that the rent had not ceased, and therefore, that the distress could be sustained. Lord C. J. *Tindal*, after remarking that the first part of the 12th section of the statute 29 Car. 2, c. 3, rendering estates *pur auter vie* devisable, extended to a rent-charge, observed—"If it is comprehended within the first branch, it is extremely difficult to put any construction on the second branch, so as to exclude it from that also; for the section goes on thus: 'And if no such devise thereof be made, the same shall be chargeable,' &c.; evidently intending that the second branch of the section shall be as comprehensive as the first, and shall relate precisely to the same subject-matter. And if this be the just construction, the second branch would govern estates *pur auter vie* in rents, as well as in any lands or tenements; and such estates would pass to the personal representative of the grantee, where the heirs are not named in the grant. The argument on the part of the plaintiff is, that the second part of the section of the statute of frauds is not to be applied to all estates *pur auter vie*, but that it is limited and restrained to such estates as were capable before the statute of occupancy, and that, as there could be no occupant of a rent-charge, inasmuch as it lay only in grant, and was not capable of actual possession, so such estate was not within the statute. It may certainly be conceded, that there could not be any general occupant of a rent, for the reasons above assigned; that is, if the rent were granted precisely as in the present

Rent *pur auter vie*, without words of limitation, held to belong to personal representative.

IN CONSIDERATION OF FEE-FARM RENT.

said [*vendor*], his heirs and assigns for ever, and to, for, or upon no other use, trust, intent, or purpose whatsoever. *(Add usual covenants for title by vendor with purchaser.)* AND the said [*purchaser*], for himself, his heirs, executors, administrators, and assigns, doth hereby covenant and agree

Covenant by purchaser to pay rent.

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case, without any mention of heirs, that no stranger could claim the enjoyment of it; but it is laid down by Lord *Coke*, and supported by other authorities, that, both in annuities and in any other thing that lieth in grant, there may be a special occupant. Now, whether the expression 'special occupant' is strictly proper, or is used by way of analogy only, as descriptive of the person, not who should occupy or enter upon, but who should receive or take rent, is immaterial; it is enough to say, the special occupant of rent was a legal phrase, known and in use long before and at the time the statute of frauds was passed. Even *Vaughan*, C. J., when arguing that the rent determines on the death of the grantee, uses the expression:—'That, if rent be granted to a man and his heirs, during another's life, the heirs shall have it, not as a special occupant, (as the common expression is), but as a descendible freehold;' thereby admitting the phrase of a special occupant of rent to be one in common use, and possessing a known meaning. But the limitation or restriction in the statute applies only to such estates whereof there could, by law, be a special occupant. 'In case there be no special occupant thereof,' says the statute, 'then it shall go to the executors or administrators of the party who takes the estate by the grant.' The sounder construction of the second branch of the section is, therefore, to make it include the grantees of rents, as such estates were held, in common parlance, to be the subject of special occupancy; and this is, at the same time, more consonant to the construction of the whole section, which seems to require that the same subject-matter as is made devisable, should also be made to vest in the personal representatives, if not devised, and if no special occupant is named in the original grant. And this interpretation of the act, if it can be drawn from the words, is evidently more consistent with the spirit and intention of the statute; for if it was inconvenient in the case of tenancy *pur autre vie* in land, that a stranger might enter and enjoy it, upon the death of the tenant, living *cestui que vie*, it was equally inconvenient, that, in case of a grant of rent, upon the death of the grantee, being *cestui que vie*, the tenant of the land should continue to hold it, without paying the rent to any one. We think, therefore, the present case is governed by the statute; and our opinion is confirmed by the decision of Lord Keeper *Harcourt*, in the case of *Rawlinson* v. Duchess of *Montague*, 3 P. W. 264, n., and of Lord Chief Justice *Willes*, in Willes' Rep. 505."

This decision settles the question in the manner the editor had ventured to anticipate, *vide ante*, Vol. 7, p. 462.

with the said [*vendor*], his appointees, heirs, and assigns, that he the said [*purchaser*], his heirs, executors, administrators, or assigns, will from time to time, and at all times hereafter, pay or cause to be paid unto the said [*vendor*], his appointees, heirs, or assigns, or other the person or persons for the time being entitled to the annual sum or yearly rent-charge of £——, under or by virtue of the uses hereinbefore expressed concerning the same, The said annual sum or yearly rent-charge of £——, in equal and even portions quarterly, on the twenty-fifth day of March, twenty-fourth day of June, twenty-ninth day of September, and the twenty-fifth day of December in every year; the first of such quarterly portions to be paid on the —— day of —— next, without any deduction or abatement whatsoever (*f*); *And also*, that he the said [*purchaser*], his appointees, heirs, executors, administrators, or assigns, will, within two years from the day of the date of these presents, erect and build, or cause to be erected and built, on the piece or parcel of ground, hereditaments, and premises hereby appointed and released, or intended so to be, with proper materials, and in a workmanlike manner, one good and substantial messuage or dwelling-house, with suitable offices, to be completed and finished within the period aforesaid; in which erection and building the said [*purchaser*], his heirs, executors, administrators, or assigns, will lay out and expend the sum of 1000*l.* at the least, and will, on the request of the said [*vendor*], his appointees, heirs, or assigns, produce to him or them the vouchers or receipts for such expenditure. *(Also, if so intended, to insure the buildings when erected against fire).* PROVIDED ALWAYS, and it is hereby declared and agreed by and between the said parties to these presents, that in case the said [*purchaser*], his appointees, heirs, or assigns, shall neglect or fail to perform his and their covenant hereinbefore expressed, for the erection and building of one good and substantial messuage or dwelling-house on the piece or parcel of ground, hereditaments, and premises hereby appointed and released, or intended so to be, and the production of the vouchers or receipts touching the expenditure hereinbefore covenanted to be made therein as aforesaid, then and in such case it shall

IN CONSIDERATION OF FEE-FARM RENT.

—and to expend 1000*l.* in erecting a messuage.

Proviso for re-entry, on non-performance of covenant to build.

(*f*) It is not usual, but seems proper in such a case as the present, to add a covenant by the purchaser for the further assurance of the rent.

IN CONSIDERATION OF FEE-FARM RENT.

be lawful for the said [*vendor*], his appointees, heirs, and assigns, or other the person or persons for the time being entitled to the said annual sum or yearly rent-charge of £——, under or by virtue of the uses hereinbefore expressed concerning the same, to enter into and upon the said piece or parcel of ground, hereditaments, and premises hereby appointed and released, or intended so to be, and hold and enjoy the same, and receive the rents and profits thereof for his and their own benefit, as in his or their first or former estate; any thing hereinbefore contained to the contrary thereof in anywise notwithstanding (*g*). IN WITNESS, &c.

(*g*) Two parts of this deed are usually executed, one for the grantee of the rent, and the other for the grantee of the land.

FREEHOLD AND LEASEHOLD ON PURCHASE BY PARTNERS.

RELEASE *in* FEE *of* FREEHOLD, *and* ASSIGNMENT *of* LEASEHOLD, *on a Purchase by* PARTNERS *in* TRADE (*a*).

THIS INDENTURE, made the —— day of ——, in the year of our Lord Christ ——, BETWEEN [*vendor*], of

Parties.

Remarks upon the precedent in the text.

(*a*) Where a trading firm purchases real estate for the purposes of the partnership, the legal estate is either conveyed to themselves jointly in fee, in trust for the purposes of the partnership, or else it is conveyed to a trustee, as in the present instance. Either mode may be adopted, according to circumstances. The advantage of vesting the property in a trustee is, that it prevents the necessity of shifting the legal estate at every change which takes place in the firm, by the introduction of a new partner or the secession of an old one. In the case of the decease of any partner, the legal estate under the joint tenancy would vest in the surviving partners. The precedent in the text may easily be adapted to a conveyance to the partners themselves, without the intervention of a trustee. This would be effected by simply leaving out the parts relating to the trustee, and making the conveyance directly to them. Indeed, a conveyance to a plurality of persons, for *any* purpose, differs so little from a conveyance to a single person, that it seemed unnecessary to introduce variations shewing the change of phraseology. On this account,

FREEHOLD AND LEASEHOLD ON PURCHASE BY PARTNERS.

&c., of the first part; [*purchasers*], all of the city of ——, —— manufacturers and co-parthers, carrying on business under the firm or stile of [A. & Co.], of the second part; and [*trustee*], of &c., of the third part. WHEREAS, by an indenture dated on or about the —— day of ——, in the fourth year of the reign of King James the First over England, made between [*lessor*], then lord of the manor of ——, in the county aforesaid, of the one part, and [*lessee*], of the other part, for the considerations therein mentioned, the said [*lessor*] did demise, grant, and let to farm to the said [*lessee*], &c., *All those (parcels), To hold* unto the said [*lessee*], his executors, administrators, and assigns, from —— then last, during and unto the full end and term of five hundred years, without impeachment of waste. AND WHEREAS, by divers assignments and other legal transmissions of the said leasehold premises, they became vested in [*late owner*], deceased, the father of the said [*vendor*], for all the residue of the said term of five hundred years, and he, the said [*late owner*], the father, by his last will and testament in writing, bearing date the —— day of ——, bequeathed all his personal estate whatsoever to the said [*vendor*], and appointed him executor of his said will; And the said [*vendor*] duly proved the same in the Court of the Archdeacon of ——, on the —— day of ——. AND WHEREAS the said [*vendor*] is seised to him and his heirs of an estate in fee-simple in possession of and in the freehold —— and hereditaments hereinafter expressed to be hereby released, free from all incumbrances, the same having descended to him as the heir-at-law of [A. B.], his late brother, deceased. AND WHEREAS the said [*vendor*] has contracted with the [*purchasers*] for the absolute sale to them of the freehold —— and hereditaments hereinafter described, and hereby released, for an estate in fee-simple in possession, and also of the said leasehold —— and premises comprised in the hereinbefore recited indenture of lease, for all the residue of the said term of —— years thereby granted, respectively free from

That leasehold premises became vested in late owner.

Will of late owner.

Vendor's seisin of freehold.

Contract for sale.

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no distinct precedent has been given of a deed of conveyance on a purchase by joint tenants. Such purchases, indeed, are seldom made unless by trustees; and then, if the trusts are disclosed on the face of the conveyance, a former precedent, *ante*, p. 90, is applicable; if they are not, it differs not from a conveyance to beneficial owners.

FREEHOLD AND LEASEHOLD ON PURCHASE BY PARTNERS.

all incumbrances, at the price or sum of £——, which purchase hath been made by the said [*purchasers*], on the account and for the purposes of their said co-partnership trade or business. NOW THIS INDENTURE WITNESSETH, that, in consideration of the sum of £—— of lawful money of Great Britain and Ireland, by the said [*purchasers*] to the said [*vendor*] in hand paid at or before the sealing and delivery of these presents, the receipt whereof he the said [*vendor*] doth hereby acknowledge, and therefrom doth release and discharge the said [*purchasers*], their heirs, executors, administrators, and assigns, for ever, by these presents, And also *(nominal consideration from trustee to vendor)*, he the said [*vendor*], at the request and on the nomination of the said [*purchasers*], testified by their severally executing these presents, *Hath* granted, bargained, sold, and released, and by these presents *Doth* grant, &c., unto the said [*trustee*], (in whose actual possession the said freehold hereditaments now are, by virtue of a bargain and sale for a year to him thereof made by the said [*vendor*], for a pecuniary consideration, and by force of the statute made for transferring uses into possession), and to his heirs and assigns, ALL THAT *(freehold parcels)*, *And* the reversion and reversions, remainder or remainders, rents, issues, and profits of the said freehold premises; *And all* the estate, right, title, interest, property, claim, and demand whatsoever, both at law and in equity, of him the said [*vendor*] of, in, and to the same premises; TO HAVE AND TO HOLD the said freehold —— and hereditaments hereby granted and released, or intended so to be, with their appurtenances, unto the said [*trustee*], his heirs and assigns, for ever, TO THE USE of the said [*trustee*], his heirs and assigns, for ever, Upon the trusts, nevertheless, and for the intents and purposes hereinafter expressed concerning the same. AND THIS INDENTURE FURTHER WITNESSETH, that, for the considerations aforesaid, and also in consideration of the sum of 10*s.* of such lawful money as aforesaid, by the said [*trustee*] to the said [*vendor*] paid at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, He the said [*vendor*], at the request and on the nomination of the said [*purchasers*], (testified as aforesaid), *Hath* granted, bargained, sold, and assigned, and by these presents *Doth* grant, &c., unto the said [*trustee*], his

Testatum.

In consideration of purchase-money, vendor releases to trustee for purchasers.

And all the estate, &c.

Habendum.

Further *testatum.*

Assignment of leaseholds by vendor to purchasers' trustee.

executors, administrators, and assigns, all and singular the —— and other the leasehold premises hereinbefore described and demised by the hereinbefore recited indenture of lease; *And* all ways, easements, rights, and appurtenances to the said leasehold —— and premises, or any part thereof, belonging or appertaining; *And* all the estate, right, title, interest, term of years yet to come and unexpired, property, claim, and demand whatsoever, both at law and in equity, of him the said [*vendor*], in and to the said leasehold premises; TO HAVE AND TO HOLD the said leasehold —— and premises hereby assigned, or mentioned and intended so to be, with their appurtenances, unto the said [*trustee*], his executors, administrators, and assigns, henceforth for and during all the residue and remainder yet to come and unexpired of the aforesaid term of five hundred years, and for all other the estate, term, and interest of the said [*vendor*] therein, Upon the trusts, nevertheless, and for the intents and purposes hereinafter expressed concerning the same; *And it is hereby declared and agreed* by and between the said parties to these presents, that the said [*trustee*], his heirs, executors, administrators, and assigns, do and shall stand and be seised and possessed of the said freehold and leasehold hereditaments and premises respectively hereby released and assigned, *In trust* for the said [*purchasers*] respectively, and their respective executors and administrators, as part of the capital or joint stock of their said co-partnership concern, and in proportion and according to their several parts or shares, rights and interests in and to the same; And it is hereby declared, that the said freehold and leasehold hereditaments and premises respectively shall, as between the real and personal representatives of the said [*purchasers*] respectively, and to all intents and purposes whatsoever, be deemed and considered in the nature of personal estate (*b*), any rule of law or equity to the contrary thereof notwithstanding. AND the said [*vendor*], for himself, his heirs, executors, and administrators, doth covenant with the said [*trustee*], his heirs, executors, administrators, and assigns, by these presents, in manner following, that is to say, that, notwithstanding any act, deed, matter, or thing whatsoever, made, done,

FREEHOLD AND LEASEHOLD ON PURCHASE BY PARTNERS.

All the estate, &c.

Habendum.

Declaration of trust.

Covenants by vendor, that, notwithstanding &c., he had power to convey.

(*b*) *Vide ante*, Vol. 7, p. 21.

FREEHOLD AND LEASEHOLD ON PURCHASE BY PARTNERS.

occasioned, or suffered by the said [*vendor*], and with respect to the said freehold hereditaments hereby expressed to be released, any act, deed, matter, or thing made, done, occasioned, or suffered by the said [*brother*], his late brother, deceased, and with respect to the said leasehold premises hereby expressed to be assigned, any act, deed, matter, or thing made, done, occasioned, or suffered by the said [*father*], his late father, deceased (*c*), to the contrary, the said [*vendor*] now hath in himself full power and absolute authority to convey and assure the said freehold hereditaments unto and to the use of him the said [*trustee*], his heirs and assigns, for ever, and also to assign and assure the said leasehold premises unto the said [*trustee*], his executors, administrators, and assigns, Upon the trusts and in manner aforesaid, according to the true intent and meaning of these presents; AND ALSO, that it shall be lawful for the said [*trustee*], his heirs, executors, administrators, and assigns respectively, peaceably and quietly to enter into, hold, and enjoy the freehold ——, hereditaments, and premises hereby expressed to be released, from time to time, and at all times for ever hereafter, And the said leasehold —— and premises hereby expressed to be assigned, from time to time, and at all times during the residue now unexpired of the said term of five hundred years, And to receive the rents and profits of all and singular the said freehold and leasehold hereditaments and premises respectively, accordingly, Upon the trusts and in the manner aforesaid, according to the true intent and meaning of these presents, without any lawful eviction, interruption, disturbance, claim, or demand whatsoever, from or by the said [*vendor*], his heirs, executors, or administrators, or any other person or persons whomsoever lawfully claiming from, through, under, or in trust for him or them; or, with respect to the said freehold premises, from, through, under, or in trust for the said [*brother*], his said late brother, deceased; or, with respect to the said leasehold premises, from, through, under, or in trust for the said [*father*], his said late father deceased, or by or through the acts or defaults of them, or any or

For peaceable enjoyment.

(*c*) This precedent exemplifies the form of the covenants where entered into by a vendor, who has derived distinct parts of the property from different ancestors, to whose respective acts the covenants extend.

either of them; *And that* free and clear of and from all former and other gifts, grants, estates, titles, charges, and incumbrances whatsoever, created or occasioned by the said [*vendor*], and, with respect to the said freehold premises, by the said [*brother*], his late brother, deceased,and, with r espect to the said leasehold premises, by the said [*father*], his late father, deceased, or by any person or persons claiming from, through, under, or in trust for them, or any or either of them, or by or through the acts or defaults of them, or any or either of them; *And moreover*, that he the said [*vendor*], his heirs, executors, and administrators, and all other persons lawfully claiming from, through, under, or in trust for him or them, and, with respect to the said freehold premises, from, through, under, or in trust for the said [*brother*], his late brother, deceased, and, with respect to the said leasehold premises, from, through, under, or in trust for the said [*father*], his late father, deceased, shall and will, at any time or times, and from time to time, upon the request and at the charges of the said [*trustee*], his heirs, executors, administrators, or assigns, or of the said [*purchasers*], or any or either of them, or the executors, administrators, or assigns of any or either of them, make, do, and execute, or procure to be made, done, and executed, all such further and other lawful and reasonable acts, deeds, conveyances, and assurances in the law whatsoever, for the more effectually and absolutely releasing, conveying, and assuring of the said freehold premises unto and to the use of the said [*trustee*], his heirs and assigns, and for the more effectually assigning and assuring of the said leasehold premises unto the said [*trustee*], his executors, administrators, and assigns, for all the residue and remainder of the aforesaid term of five hundred years, Upon the trusts and in the manner aforesaid, according to the true intent and meaning of these presents, as by him the said [*trustee*], his heirs, executors, administrators, or assigns, or the said [*purchasers*], or some or one of them, or the executors, administrators, or assigns of some or one of them respectively, or his or their counsel, shall be advised and required, so as such further assurances, or any of them, contain no further or other warranty or covenants than against the person or persons who shall make the same, and his, her, or their heirs, executors, and administrators re-

FREEHOLD AND LEASEHOLD ON PURCHASE BY PARTNERS.

Free from incumbrances.

And for further assurance.

FREEHOLD AND LEASEHOLD ON PURCHASE BY PARTNERS.

spectively, and so as such person or persons be not compellable to travel from the place or places of his or their abode. IN WITNESS, &c.

BY TWO CO-HEIRESSES, AND ASSIGNMENT OF MORTGAGE TERM.

RELEASE *in* FEE *from two* CO-HEIRESSES, *where the* PURCHASER, *previously to the Conveyance, had sold part to a third Person, with* ASSIGNMENT *of* MORTGAGE TERM *to* ATTEND *the* INHERITANCE (*a*); *and* COVENANT *to* SURRENDER *Copyhold, where the Freeholds and Copyholds are intermixed.*

Parties.

THIS INDENTURE, made the —— day of ——, in the year of our Lord 1831, BETWEEN [*first vendor*], of &c., spinster, and [*second vendor*], of &c., spinster, of the first part; [*mortgagee*], of &c., of the second part; [*purchaser*], of &c., of the third part; [*trustee to prevent dower*], of &c., of the fourth part; and [*trustee of term*], of &c., of the fifth part. WHEREAS,

Recital of mortgage.

by indenture bearing date on or about the —— day of ——, and expressed to be made between [*late owner*] (*b*), deceased, of the one part, and the said [*mortgagee*], of the other part, It is witnessed, that, for the considerations therein expressed, the said [*uncle*], in pursuance of every power and authority to him given, and in exercise thereof, did appoint, grant, and demise unto the said [*mortgagee*], *All that (parcels, describing them);* (Save and except all such parts thereof as were copyhold or of customary tenure) (*c*): *To hold*

(*a*) The observations made on the assignment of a term in a mortgage precedent, (*vide ante*, Vol. 5, p. 479), apply to the present.

(*b*) As it is convenient, for the purpose of elucidating the subsequent recitals, that the relationship of the late owner to the vendors should be apparent, he will be designated as "uncle."

(*c*) Here it seems not to have been distinctly known what part of the estate was copyhold and what was freehold.

BY TWO CO-HEIRESSES, AND ASSIGNMENT OF MORTGAGE TERM.

the same unto the said [*mortgagee*], his executors, administrators, and assigns, from the day next before the day of the date of the now reciting indenture, for the term of five hundred years, but subject to a proviso for the redemption of the said hereditaments, on payment by the said [*uncle*], his heirs, executors, administrators, or assigns, to the said [*mortgagee*], his executors, administrators, or assigns, of the sum of 700*l.*, with interest for the same, after the rate and on or at the day or time therein mentioned and now past; and in pursuance of a covenant for that purpose contained in the said indenture, the copyhold parts of the said hereditaments were surrendered by the said [*uncle*] To the use of the said [*mortgagee*], his heirs and assigns, according to the custom of the manor of ——, in the said county of ——, (being the manor of which the said copyhold hereditaments are parcel), for better securing the payment of the said sum of 700*l.* and the interest thereof; And whereas default was made in payment of the said sum of 700*l.*, at the time, by the said in part recited indenture, appointed for payment of the same; And whereas the said [*uncle*] departed this life on or about the —— day of ——, in the year ——, intestate as to his real estate, and without issue, and thereupon the freehold and copyhold hereditaments hereinbefore mentioned, and all other the real estate of or to which the said [*uncle*] was seised or entitled at the time of his decease, descended to the said [*first vendor*] and [*second vendor*], as his nieces and co-heiresses at law; And whereas the said [*first vendor*] and [*second vendor*] respectively are the only children of [*father*] and [*mother*], his wife, who were married in the parish church of ——, in the county of ——, on the —— day of ——, And the said [*first vendor*] and [*second vendor*] were respectively baptized in the said parish church, on the —— day of ——, 17—, and the —— day of ——, 17—; And whereas the said [*father*] was the eldest brother of the said [*uncle*], deceased, they being respectively the sons of [*grandfather*], of &c., and [*grandmother*], his wife, who were married in the parish church of ——, in the county of ——, and the said [*father*] and [*uncle*], deceased, the sons of the said [*grandfather*], as aforesaid, were respectively baptized at the places and times following, that is to say, the said [*father*] in the said parish church of ——, on the ——

—Default in payment, and death of uncle.

Recital of pedigree of vendors;

BY TWO CO-HEIRESSES, AND ASSIGNMENT OF MORTGAGE TERM.

day of ——, and the said [*uncle*] in the parish church of ——, in the county of ——, on the —— day of ——; AND WHEREAS the said [*uncle*] was interred in the burial ground of the said parish of ——, on the —— day of ——, and the said [*father*] was interred in the burial ground belonging to the denomination of Protestant Dissenters, called Independents, in the town of ——, in the county of ——, on the —— day of ——, 18— (*d*); AND WHEREAS the said [*first vendor*] and [*second vendor*] lately agreed with the said [*purchaser*] for the absolute sale to him of all and singular the freehold and copyhold messuages or tenements, lands and hereditaments, mentioned and comprised in the said before in part recited indenture of mortgage, And also of a certain piece of land, (not included in the said mortgage), of or to which the said [*uncle*] was seised or entitled at the time of his decease, (and which was purchased by him of [A. B.], of ——, widow), at or for the price or sum of 1500*l.*; AND WHEREAS the said [*purchaser*] hath since contracted with [*sub-purchaser*], of ——, for the absolute sale to him of the hereditaments so as aforesaid purchased by the said [*uncle*] of the said [A. B.], and of a piece or parcel of land, containing one acre, two roods, thirty-six poles, allotted to the said [*uncle*], in respect of the said hereditaments comprised in the said indenture hereinbefore recited, at or for the price or sum of 300*l.*; and the said hereditaments so contracted to be sold to the said [*sub-purchaser*], as aforesaid, are intended to be conveyed to him by the said [*first vendor*], [*second vendor*], and [*purchaser*].

—of contract for sale;

—of sub-purchase of part.

As to reciting the pedigree.

(*d*) Though statements of this kind tend to swell the bulk of the deed, and certainly increase the draftsman's labour, by requiring his attention to many minute details, yet the importance of preserving a record of such facts seems to outweigh both these considerations. The judicious advocate for conciseness complains not of the space devoted to purposes of this nature, but to the accumulation of unnecessary and tautologous clauses and expressions, which obscure instead of elucidating the intention of the parties, and leave him the less room for the recital of extrinsic facts material to the title, of which the deeds of conveyance would afford a most valuable repertory. If the plan were generally pursued, the title-deeds themselves would supply materials for preparing a complete abstract of the title, including the requisite corroborative evidence.

by indentures of lease and release already prepared, and bearing or intended to bear date on the day next before, and even date with these presents (*e*); And whereas the said sum of 300*l.* being deducted from the said purchase-money or sum of 1500*l.*, the sum of 1200*l.* only remains to be paid by the said [*purchaser*], as the purchase-money for the said freehold and copyhold hereditaments mentioned or comprised in the said indenture hereinbefore recited; and the said sum of 1200*l.* hath been apportioned in manner following, that is to say, the sum of 800*l.*, part thereof, is agreed to be the apportioned price of the said freehold hereditaments, and the sum of 400*l.*, the residue thereof, is agreed to be the apportioned price of the said copyhold hereditaments (*f*); And

BY TWO CO-HEIRESSES, AND ASSIGNMENT OF MORTGAGE TERM.

Apportionment of consideration money.

(*e*) Where part of the estate comprised in the original contract for sale has been sub-sold by the purchaser, and conveyed by a separate deed, and the purchase-money paid by the sub-purchaser has gone into the hands of the original vendor, in reduction of his purchase-money, it seems to be usual to state the fact in the conveyance of the remainder; and certainly there may be circumstances rendering this plan advisable, (as where, in consequence of the great advance of price obtained by the purchaser on the sub-sale, the remainder of the purchase-money would appear to be an inadequate price for the remainder of the property); but, in general, there seems to be no reason why the two properties should not be treated as distinct purchases, the purchase-money for that portion which is conveyed to the original purchaser being the original purchase-money *minus* the sum paid by the sub-purchaser to the vendor. Each deed will, of course, bear the stamp appropriate to the separate transaction.

Remarks upon the sub-contract.

(*f*) Where freeholds and copyholds, or leaseholds and copyholds, are purchased for one entire price, the surrender being made by the stamp act the "principal" instrument, *i. e.* the instrument which is to bear the *ad valorem* stamp in respect of the copyholds, it becomes necessary to apportion the consideration-money, in order that some share of the duty may be placed on the surrender. It is usual in such cases to insert in the deed of conveyance of the freeholds or leaseholds, the covenants for title relating to the copyholds, and then the deed recites the entire purchase and the apportionment of the consideration. If, however, the freeholds or leaseholds are likely hereafter to become disunited in ownership from the copyholds, the conveyance of the one and the covenants as to the other should be contained in separate deeds; and then it would be unnecessary to state the fact of the apportionment at all: for the stamp act does not require, as seems to be commonly supposed, that this should be done—it merely authorizes purchasers to apportion the consideration-money where properties of different tenures, or held under different titles, are sold at

Apportionment of consideration-money, in regard to the stamp.

—That mortgage-money remains due.

WHEREAS the said principal sum of 700*l.* is now due and owing to the said [*mortgagee*], under or by virtue of the said

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one entire price. Where separate conveyances, therefore, are taken, the subject of each deed may be treated as a distinct purchase, without referring to the contract as to the other, only taking care, of course, that the aggregate amount of the several purchase-monies equals the entire consideration-money for the whole.

The observations which have been made respecting the apportionment of the consideration-money on a joint purchase of freeholds or leaseholds, and copyholds, are equally applicable to the case of a purchase of several copyhold estates held of distinct manors, which will require, of course, several surrenders. But it must be remembered, that the necessity of apportioning the consideration-money, in all these cases, arises solely from the imposition of the stamp duty on the *surrender;* and where no surrender is necessary, as in the instance of a sale of copyholds by executors or others*, having a power only and not an estate, the stamp duty being imposed on the deed of bargain and sale, it would not be necessary to apportion the consideration-money, provided that the several properties which compose the entire subject of the contract be conveyed by the same deed, any more than it is where freeholds and leaseholds are comprised in the same conveyance. It is observable, moreover, that the act leaves parties at liberty to apportion the consideration-money arbitrarily, without regard to relative value, (any inquiry as to which would be attended with much difficulty), and without regard to the fact whether the duty is increased or diminished by the apportionment, though the scale of duties is so framed as to render it possible that a considerable reduction may be effected by it; for instance, if a sum of 2000*l.* were split into two sums of 1800*l.* and 200*l.*, the duty would be reduced from 25*l.* to 14*l.*

Plan of taking separate conveyances recommended.

The apportionment clause in the act, it will be observed, applies not only to the case of lands being of different tenures, but also to that of lands of the same tenure being held under different titles; and therefore, if a person purchases several freehold, leasehold, or copyhold houses at an entire price, which were derived through different titles, he would be at liberty to take from the vendor a distinct conveyance of each house, apportioning the consideration as he might think proper, and without the necessity, as already suggested, of referring, in any one of the deeds, to the contract, as regarded the property conveyed by the others: and it is often advisable to take the conveyances in this manner; for, the addition to the

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* *Vide* precedent of a conveyance of copyholds by testamentary donees, *ante*, p. 60.

indenture hereinbefore recited, but all interest thereon has been paid to the day of the date of these presents, as he, the

BY TWO CO-HEIRESSES, AND ASSIGNMENT OF MORTGAGE TERM.

expense, if the parties are not unusually numerous, and the deeds are framed with conciseness, is trivial, while, on the other hand, the future inconveniences resulting from several properties being included in one conveyance are great. It frequently happens, that a landed proprietor who wishes to raise a small sum of money, incumbers the whole for want of having a distinct conveyance of part of his property. And if the estate becomes hereafter distributed among several persons, either as purchasers or volunteers—an event which the exigencies of a family, requiring provision to be made for its different members, are extremely likely to produce—the advantage of having separate conveyances is obvious, in avoiding the necessity of giving attested copies and covenants for production, to say nothing of the disputes which frequently arise between contending claimants for the custody of the deeds relating to their common property. *Vide* some observations *ante*, Vol. 7, p. 373.

Construction of the term "different titles."

A question may arise as to what is meant by the expression "different titles," in the clause of the act; it could hardly be considered to import, that the respective titles should have been, in every stage of their past history, wholly distinct, presenting no one point of identity, until the properties became united in the vendor. It would probably be enough, that the vendor derived the properties through different channels, though they might antecedently have belonged to one proprietor. Indeed, it has been thought by some whose opinions are entitled to great weight, that, even in cases not within the apportionment clause of the act, a purchaser might take distinct conveyances of several parts of the purchased estate, apportioning the consideration in such manner as he thought proper. But, as an argument against this construction may be drawn from the clause authorizing apportionment under certain restrictions (and which is unnecessary and absurd according to the notion in question), and as the penalties for mis-stating the consideration-money are frightfully severe, a solicitor can hardly be advised to incur the risk; particularly if the proposed apportionment would have the effect of reducing the aggregate amount of duty.

As to comprising in one conveyance property purchased of different vendors.

Consistently with the principle of the enactment which authorizes purchasers, in taking their conveyance, to treat the several parts of an estate purchased for an entire consideration, as distinct purchases, it is also provided, that a purchaser may comprise in one conveyance the properties purchased of different persons, paying duty only on the aggregate amount of the purchase-money; and where the several properties are in such a relative local situation as to make it almost certain that they will hereafter be held by the same proprietor, this may be a convenient mode of fram-

BY TWO CO-HEIRESSES, AND ASSIGNMENT OF MORTGAGE TERM.

said [*mortgagee*], doth hereby acknowledge; And it is intended, and hath been agreed, that the said sum of 700*l.*

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ing the conveyance; and sometimes a saving of expense, with respect to stamp duty, would be effected by it. Thus, if A. purchased of B. an estate for 10,000*l.*, and of C. an estate for 2000*l.*, the stamp payable on the purchase from B. would not be increased by his including the purchase from C.; and, therefore, the duty which would be payable on the latter would be wholly avoided; but the saving of expense by the diminution of stamp duty, or of the number of deeds, is dearly purchased at the risk of incurring future inconvenience, in case the property should, at a subsequent period, be split into distinct portions; and therefore, the expedient ought never to be adopted if this event is likely to happen; and likely it should be deemed to be, unless one part is absolutely essential to the beneficial enjoyment of the other. Of course, where a purchaser buys several aliquot shares in the same property, entering into a separate contract with each owner, it is desirable to include the conveyance of the whole in one deed, and which deed will bear the *ad valorem* duty payable on the aggregate purchase-money.

As to contracts and conveyances of equitable interests.

It is observable that the Legislature has imposed the *ad valorem* stamp upon the deed of *conveyance*, and not upon the contract; and therefore, if a party is content with his equitable title acquired by the contract, without taking a conveyance, he avoids the *ad valorem* stamp altogether; *vide Wilmot* v. *Wilkinson*, 6 B. & C. 506, 9 D. & R. 620, *ante*, p. 133. But it is seldom that this course can be recommended, on account of the danger of allowing the legal title to remain outstanding, which, in the hands of an adverse equitable claimant, without notice, would confer priority. But where the subject of the sale is an equitable interest, the whole property passes by the contract, leaving nothing for any more formal instrument to operate upon. Thus, if lands have been devised to the use of A. in fee, in trust for B., and B. contracts with C. for the sale of his equitable interest; or if lands have been mortgaged in fee, and the mortgagor contracts for the sale of the equity of redemption, and the whole purchase-money is shewn to have been paid, the purchaser's equitable title is complete, and he has the same right to call for a conveyance of the legal estate from A., the trustee, in the first instance, and from the mortgagee, on redeeming the mortgage, in the second, that he could have derived from the most formal instrument of conveyance*. If, however, a bill were filed to com-

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* See some pertinent remarks upon this subject in Hayes's Concise Conv. p. xxiv., a work which combines some profound disquisitions on fundamental principles, with much useful information on points of every-day occurrence.

shall be discharged out of the said purchase-money; and that the said term of five hundred years so vested in him, the said

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pel a trustee or mortgagee to convey the legal estate according to an equitable title created by an executory contract for sale, under which the consideration-money had been paid, it seems doubtful whether the contract could be received as evidence of the plaintiff's equitable title, until it had been impressed with an *ad valorem* stamp as a conveyance; since the purchaser, in founding upon the instrument his claim to get in the legal estate, treats it not as an executory contract, but as an actual alienation or transfer of the subject-matter. It may sometimes happen, however, that the legal estate is already in the purchaser, either as mortgagee or trustee*; in which case, if he purchases the equitable title, and has, in addition to the contract for purchase, evidence of the payment of the purchase-money, it would be impossible to say that the whole legal and beneficial interest is not in him. Still, however, it would be a question whether, if a redemption bill were filed by the mortgagor, the contract could be given in evidence as a bar to the right of redemption, unless stamped as a conveyance; and if it could not, future purchasers would be entitled to require that it should be so stamped. It is to be observed, that the stamp is regulated by the circumstances existing at the time of the conveyance, or, in other words, by the contract which is ultimately executed, and not by the original contract; and if, therefore, in the interval between the time of the contract being entered into and its execution, the terms of the original bargain have undergone any alteration, the stamp is governed by the altered terms of the contract, even though the alteration were evidently or avowedly made for the purpose of reducing the stamp duty. It is enough that the deed expresses the sum which actually and eventually passes from the vendee to the vendor. Thus, if a man who sold an estate for 1000*l.* agrees to accept 999*l.*, in order to reduce the stamp duty, this would be a perfectly legal transaction, and the conveyance would be liable only to the stamp as on a purchase below 1000*l.* The case of *Shepherd* v. *Hall*, 3 Camp. 180, is a decisive authority on this point, though it arose on the construction of another statute. The circumstances were as follow:—"The plaintiff, being about to put his son to the defendant, as an apprentice, in the business of a pawnbroker, it was agreed between the parties that a premium of 20*l.* should be paid. The defendant, however, afterwards said, it would make no difference if he received only 19*l.* 19*s.* 6*d.*, and that he should thus escape the payment of a certain share of

* But, as to purchases by trustees, *vide ante*, Vol. 5, p. 329, 2nd ed., and *vide* also, as to a purchase by a mortgagee, a suggestion, *ante*, Vol. 7, p. 527.

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[*mortgagee*], as aforesaid, for securing the payment thereof, shall be assigned to the said [*trustee of term*], his executors,

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duty. The latter sum was accordingly inserted in the indentures, and paid. The stat. 8 Ann. c. 9, s. 32* enacts, that the duty shall be paid upon the sum "which shall be given, paid, *contracted, or agreed for*, with or in relation to every clerk, apprentice, or servant." It was therefore insisted, that 20*l.* was the sum agreed for here; and that, since the duty had not been paid upon that, the indentures were void, and the money might be recovered back, as upon a failure of consideration. Lord *Ellenborough*.—"The sum agreed upon must mean the sum finally agreed upon, which, in this instance, was 19*l.* 19*s.* 6*d.*; and, the duty being paid upon that sum, the indenture is valid, and the plaintiff has a full consideration for the premium. It would have been necessary for him, besides, to have proved that he was imposed on by the defendant, and not *in pari delicto*."

Stamp is regulated by the expressed consideration.

And here it may be observed, that the *ad valorem* stamp on instruments of every description is regulated by the *expressed* consideration; and if this does not accord with the true consideration, the penal consequence of the mis-statement falls, as it ought, exclusively upon the persons engaged in the transaction; and the validity of the deed is not affected. *Robinson* v. *M'Donnell*, 5 M. & S. 228; *Duck* v. *Braddyl*, M'Clel. 217; *Doe* d. *Kettle* v. *Lewis*, 10 Barn. & Cress. 673. On the same principle, the stamp on a bill of exchange is regulated by the *apparent* date; and therefore, a bill at two months after date is liable to the stamp applicable to a two months' bill only, though it were actually issued several days before the day it bears date, having been post-dated by the acceptor. *Upston* v. *Marshall*, 3 D. & R. 198, *S. C.* 2 B. & C. 10. See also *Peacock* v. *Murrell*, 2 Stark. 558.

Deed construed to be a settlement, notwithstanding the payment of a pecuniary consideration.

The payment of a pecuniary consideration by the grantee in an absolute deed of conveyance, does not necessarily constitute the transaction a purchase, so as to subject the deed to a purchase stamp, if that, upon the whole, does not appear to be its true character. Thus, where A., being seised in fee of lands, by deed, reciting that he was resolved to give the same to his son B., as well in consideration of natural love and affection as of the provision that B. had that day made by bond of 1500*l.*, in augmentation of the portions of his eight sisters, conveyed the lands to B. The deed had not any *ad valorem* stamp; which was made an objection to its admissibility in evidence. But the Court held that the stamp was

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* It has been decided, that this act, which requires the "full" consideration-money to be "truly inserted," is not violated by stating too large a sum. *King* v. *Keynsham*, 5 East, 309.

administrators, and assigns, upon the trusts and in manner hereinafter mentioned. NOW THIS INDENTURE WIT- *Testatum.*

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sufficient. Mr. Justice *Bayley* said—"I cannot agree to the position, that wherever money is paid there is a sale. A father may give his estate to be divided amongst his children, leaving the mode of division to be arranged by them. Suppose a father were to give an estate to his son, stipulating at the same time that he should provide for his sisters, and the son were to agree to give them, and actually gave them, 10,000*l.*, surely that would not make it a sale of the estate by the father to the son." Mr. Justice *Holroyd* observed, that the transaction in question was not a sale of lands within the meaning of the Legislature. "'A 'sale,'" said the learned Judge, "imports a *quid pro quo*, in some way or other enuring to the benefit of the party selling. Here no benefit accrued to the father, it was altogether a gift to the son for the benefit of himself and the other members of his family. The father had no compensation, so considered in point of law. It is admitted that no duty would attach if the whole estate were divided amongst the different members of the family: if, then, any one receives money in lieu of his share of the estate, can that make it a sale within the meaning of the statute? It is true, that the son paying money for the estate may, in some sort, be considered a purchaser, but that does not make the father a seller; and to bring the case within the statute, I think there must be a sale as to both." *Denn* d. *Manifold* v. *Diamond*, 4 Barn. & Cress. 243, 6 Dowl. & Ryl. 328.

The grant of an annuity, in consideration of grantee relinquishing life interest in a fund, held not to be a sale of an annuity.

So, in the case of *Blandy* v. *Herbert*, 9 Barn. & Cress. 396, where A., who was entitled to a life interest in 1700*l.* Three *per cent.* Consols., made with B., who was entitled in right of his wife to the absolute reversion, the following agreement, that A. should relinquish his life interest in the fund in order that it should be sold, and the produce paid to B., who should secure to her by bond and warrant of attorney an annuity at the rate of 5*l. per cent.* on the produce of the sale. B., moreover, assigned to trustees a policy of insurance on merchandize at sea for better securing the annuity, and which assignment was expressed to be made in consideration of the produce of the 1700*l.* Consols. having been paid to B., and B. covenanted that in case no sum should become payable under the policy by a certain period, he would pay to the trustees such a sum as when invested in 3*l. per cents.* would produce the annual sum agreed to be paid by him. It was contended, *first*, that the transaction described in the deed was the sale of an annuity; and *secondly*, that the deed operated as an assignment of property, and that in either case an *ad valorem* stamp was necessary. Lord *Tenterden*, C. J.—"I am of opinion that the policy (no loss having occurred,) cannot be considered property within the meaning of the 55 Geo. 3, c. 184, Sched. Part 1. It seems to me also that the transaction described in the deed cannot be con-

Policy of insurance on merchandize at sea, not "property," so as that an as-

BY TWO CO-HEIRESSES, AND ASSIGNMENT OF MORTGAGE TERM.

NESSETH, that, in consideration of the sum of 700*l.* of lawful money of Great Britain and Ireland, part of the said

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signment should be subject to duty.

sidered a sale of an annuity in the ordinary sense and acceptation of the words; and the Legislature must be taken to have used the words in their ordinary meaning and acceptation."

Conveyance in trust for creditors generally does not require an *ad valorem* stamp.

In the case of *Coates* v. *Perry*, 6 J. B. Moore, 188, the question was raised whether a deed which was produced in evidence required an *ad valorem* stamp as a conveyance or mortgage. The deed recited that the grantors were indebted to the three grantees in certain sums (mentioning them), and to various other persons in several sums of money (not mentioning them), which they were unable to discharge. It then contained an assignment by the debtors for a nominal pecuniary consideration of their crops and other personal estates to the three creditors, upon trust for sale; and it was declared that the trustees should stand possessed of the monies to arise from the sale, and also of the debts to be received by them, (and which they were authorized by a power of attorney in the deed to receive), upon trust, after paying expenses, to satisfy the debt owing to themselves with interest, and then to apply the residue in satisfaction of the other debts owing by the grantors, and to pay the surplus to the grantors. The deed had only a common deed stamp of 1*l.* 15*s.*, and which the Court held to be sufficient. Mr. Justice *Park*, after quoting the passage of the stamp act imposing the duty on conveyances, observed, that the statute only required the *ad valorem* duty to be paid where the purchase or consideration money amounted to certain sums therein specified; which shewed that the Legislature intended that such duty should be payable on an immediate consideration expressed on the face of the instrument: but here the consideration money, as mentioned in the deed, amounted to 10*s.* only; he considered, therefore, that it was not liable to the *ad valorem* duty on conveyances; and that being for the benefit of creditors generally, though the primary trust was to secure the debts owing to the grantees, it was within the clause of exemption from the mortgage duty. (Which see *ante*, Vol. 6, p. 253).

Reference to unstamped schedules does not invalidate deed.

A few other points connected with the stamp laws may here conveniently be noticed. In the case of *Duck* v. *Braddyll*, M'Clel. 217, *S. C.* 13 Pri. 455, it was contended that a lease was void, because it referred to certain inventories or schedules which were not stamped; but Lord C. B. *Alexander* overruled the objection, remarking, that as they were not attempted to be given in evidence, it was not material, there being no provision in the stamp laws which made void a deed given in evidence because it referred to inventories which were not stamped. The inventories referred to were of course detached papers; for if they had been indorsed on or annexed to the deed in question, they would have formed a component part of such deed, and which in that case ought to have borne a

sum of 800*l.* to the said [*mortgagee*] paid by the said [*purchaser*], immediately before the execution of these presents,

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stamp adequate to include them, otherwise *no* part of the deed would have been admissible in evidence. Thus, in the case of *Lake* v. *Ashwell*, 3 East, 326, where a bill of sale of goods under seal executed as a security was offered in evidence, which had an inventory of the goods annexed to it. The bill of sale itself had the proper deed stamp, but the inventory was stamped with the schedule stamp only; it was objected, that the inventory annexed and referred to in the bill of sale was part of the same deed and ought to have a deed stamp, and the Court was of this opinion. Lord *Ellenborough* said—"The meaning of the clause in the act of Parliament was, that if any schedule or inventory of goods were unattached to or making part of any thing else which required a different stamp, it should have the stamp of 2*s.* 6*d.** thereby imposed: but that if the schedule were annexed to and formed part of any other instrument which required a specific stamp, it must have the proper stamp required for that instrument of which it is a part. And if this were not so, the revenue would be liable to great evasion; for then an instrument, requiring a certain stamp in proportion to the number of words, would only contain a few words of reference to a schedule, by which every thing would be conveyed for a trifling stamp in fraud of the revenue."

Stamp imposed on schedules.

This case arose on the statute of the 37th Geo. 3, c. 90. The late act of the 55 Geo. 3, c. 184, is very explicit on the point. The clause imposing a duty on schedules is as follows:—"Schedule, inventory, or catalogue of any lands, hereditaments, or heritable subjects, or of any furniture, fixtures, or other goods or effects; or containing the terms and conditions of any proposed sale, lease, or tack, or the conditions and regulations for the cultivation or management of any farm, lands, or other property, leased or agreed to be leased; *or containing any other matter or matters of contract or stipulation whatsoever;* which shall be referred to in or by, and be intended to be used or given in evidence as part of, or as material to any agreement, lease, tack, bond, deed, or other instrument, charged with any duty in this schedule, but which shall be *separate and distinct from, and not indorsed on, or annexed to* such agreement, lease, tack, bond, deed, or other instrument, 1*l.* 5*s.* And if the same shall contain 2160 words or upwards, then for every entire quantity of 1080 words contained therein, over and above the first 1080 words, a further progressive duty of 1*l.* 5*s.*" "*Printed proposals published by any corporation or company respecting insurances, and which shall be referred to in or by any po-*

* This is now 1*l.* 5*s.* *vide* act, 55 Geo. 3, c. 184, tit. "*Schedule.*"

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at the request and by the direction of the said [*first vendor*] and [*second vendor*], testified by their respectively ex-

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licy or instrument of insurance issued by such corporation or company" are exempted from stamp-duty.

As the Legislature has now charged schedules with a stamp duty nearly equal to the progressive duty on deeds, little is saved by referring to separate schedules, and it is seldom done. The usual and better course is to indorse on or attach to the deed any schedule or inventory containing additional matter that cannot conveniently be embodied in the deed, and then, in computing the folios, the schedule is included as a matter of course. In this computation, allowance must be made for the memorandum subscribed by, and the subscription of, the attesting witnesses; but the memorandum usually indorsed, denoting the date, parties' names, &c., need not be included. *Winder* v. *Fearon*, 7 Dowl. & Ryl. 185; *S. C.* 4 Barn. & Cress. 663.

Stamped instrument may be referred to.

But, though generally a paper writing or document cannot be referred to without being stamped either as part of the instrument or as a separate schedule, it seems that an instrument may refer to and adopt the contents of another instrument properly stamped, without requiring or subjecting the instrument referred to to any additional stamp; and therefore, in a recent case, where the plaintiff produced in evidence three agreements, the first being a contract for the sale of certain real property; the second, altering the terms of the former agreement, and providing that all disputes between the parties should be submitted to arbitration; and the third, which was indorsed on the second, making some further alterations, and declaring that the provision for arbitration contained in the second agreement should extend to that, the third agreement, and to every clause therein contained, in like manner as if the same had been therein repeated; and it was contended that the third agreement ought to bear a stamp sufficient to cover the arbitration clause referred to in it, which was to be considered as actually embodied in the agreement; the objection was decided to be untenable. Lord *Tenterden* said—The duty is imposed by the 55 Geo. 3, c. 184, upon the words contained in the instrument itself, together with "every schedule or receipt, or other matter put or indorsed thereon or annexed thereto." In *Lake* v. *Ashwell* the schedule was annexed to the deed in the very words of the act of Parliament; in the present case the words of the clause of reference were not in the instrument, nor in any schedule, receipt, or other matter put or indorsed thereon or annexed thereto. *Attwood* v. *Small*, 7 Barn. & Cress. 390; *S. C.* 1 Man. & Ryl. 246.

Remarks upon the case of *Attwood* v. *Small.*

In treating this case as deciding that a stamped instrument may be referred to without requiring or subjecting the deed which refers to it to an

ecuting these presents, and in full satisfaction and discharge of all principal monies and interest now due and owing to the

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additional stamp, I have regarded rather the facts of the case than the arguments contained in the judgment, between which there is some incongruity; for Lord *Tenterden*, it will be observed, rests the decision of the Court solely on the ground of the instrument referred to not being matter annexed to or indorsed upon the agreement in question, and not on that of its being a stamped instrument, though it is explicitly stated in the report that the third agreement *was* indorsed upon *and therefore necessarily had upon its own back* the second agreement to which it refers. If we exclude from our consideration, therefore, the fact of the second agreement being a stamped instrument, the case would be directly in the teeth of the act of Parliament. It would lead to much inconvenience if parties were not allowed to refer to an existing instrument; and on this account, as well as of the impossibility of supporting the case of *Attwood* v. *Small* on any other ground, it is probable that it would be considered as authorizing such a conclusion. It seems to follow, that, if an annexed stamped instrument can be referred to without being considered as part of the instrument which refers to it, a disannexed stamped instrument may be referred to without requiring a schedule stamp.

The expedient of referring to stamped instruments might be resorted to for the purpose of avoiding stamp duty to an extent beyond what is ordinarily attempted. Thus it would be sufficient in a release grounded on a bargain and sale for a year, to refer to the parcels of the bargain and sale. A lease for a year, it has been elsewhere noticed, is not liable to the progressive duty. *Vide ante*, Vol. 6, p. 271. Any quantity of matter may therefore be comprised within the stamps mentioned in the act. The clause is as follows:—

Stamp on lease for a year.

"Bargain and sale (or lease) for a year, for vesting the possession of lands or other hereditaments in England, and enabling the bargainee to take a release of the freehold or inheritance, upon the sale or mortgage thereof;

	£	s.	d.
Where the purchase or consideration money expressed in the release shall not amount to 20*l.*	0	10	0
And where the same shall amount to 20*l.* and not to 50*l.*	0	15	0
And where the same shall amount to 50*l.* and not to 150*l.*	1	0	0
And where the same shall amount to 150*l.* or upwards	1	15	0
Bargain and sale (or lease) for a year, upon any other occasion	1	15	0"

Leases for a year being the subject of an express particular stamp, of course are not liable to the progressive duty imposed on deeds "not

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said [*mortgagee*], under or by virtue of the said indenture hereinbefore recited, the receipt of which said sum of 700*l.*,

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otherwise charged." This point is so clear that it may safely be acted on even by those who are generally unwilling to hazard the creation of subjects for future controversy by ingenious contrivances for avoiding present expense.

Deed cannot be used in a second transaction between the same parties, without being re-stamped.

Of course, a deed which has once performed its office cannot be used in a second transaction to which the terms of it may happen to apply. Thus, in the case of *Hammond* v. *Foster*, 5 D. & E. 635, where A. granted a redeemable annuity to B., which he redeemed, paying over the redemption money to B.'s attorney, from whom he received the annuity deeds cancelled. A. afterwards applied to the attorney to procure him more money, who informed him that he had not paid over to his client the money he had received for redeeming the annuity, and that he would re-deliver to A. that sum on receiving back the deeds. This was done, and one of the grounds for an application to the Court for setting aside the annuity was, that it was an entirely new transaction, and that there ought to have been new stamps on the deeds; and of this opinion was the Court.

Deed cannot be added to, after execution, without a fresh stamp.

Where a material addition has been made to a deed after all the circumstances essential to its operation are complete, this additional matter requires to be stamped as a separate instrument, whether it is written upon the same piece of parchment or not. Thus, where A., by indenture dated the 30th of November, 1793, granted to B. an annuity of 60*l.*, on which indenture was found the following indorsement, dated the 5th of December, 1793—"Memorandum, that, at the time of the execution of the within-written indenture, it was agreed by and between the within-named J. Weatherhead and P. Schumann, that W. should be at liberty at any time to redeem the within-mentioned annuity, on giving six months' notice in writing to S., and paying the whole of the arrears then due," &c. Signed by both parties, and witnessed. The Court was of opinion that the indorsement could not be received in evidence, because, though written on the same parchment, it appeared to have been executed at a different time from the indenture, and was not stamped as a separate instrument. *Schumann* v. *Weatherhead*, 1 East, 537. On the same principle it is clear that an alteration cannot be made in a bill of exchange, after it is issued, without a fresh stamp. *Knill* v. *Williams*, 10 East, 431; *Bathe* v. *Taylor*, 15 East, 412; *Downs* v. *Richardson*, 5 B. & A. 680; *Bowman* v. *Nicholl*, 5 D. & E. 537.

Correction of a mistake, which was essential to the operation of

But it is clear that an alteration made in a deed, by merely correcting the mis-statement of a fact, and not arising from any change of intention in the parties, and more especially if the instrument were previously incapable

he, the said [*mortgagee*], doth hereby acknowledge, and from the same doth hereby acquit and discharge the said

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of legal operation, does not, nor does the re-execution of the deed consequent on such alteration, subject it to a fresh stamp; and therefore, where, after the execution of a bill of sale of a ship, it was discovered that the certificate of registry was mis-recited, whereupon the error was rectified and the deed was re-executed, but without any new stamp, an objection to its admissibility in evidence on this account was overruled. Lord *Ellenborough* said—"This bill of sale, when first executed, was, from the mistake in the recital of the certificate of registry, to all intents and purposes null and void, it took no effect whatever from its first delivery, and the stamp impressed upon it was wholly inoperative. This defect arose not from intention but from mistake. The instrument, as first executed, was not what the parties meant to execute, and it was not in the state in which it was at first intended to be till it was altered. This is not the case of substituting a new and second contract in the place of a preceding effectual one, upon a change of intention in the parties, but merely making the contract what it was originally intended to have been; and in such a case, where the instrument upon its first execution was void to all intents and purposes, where its insufficiency arose from a mere mistake, where, in consequence of that mistake, it was not in the state in which it was intended to have been when it was so executed, and where upon its second execution it is only put into that state in which it was originally intended to have been, we think it is not going beyond the fair spirit of the stamp laws to hold that, upon such second execution, being the first which was effectually operative, a new stamp was not requisite." *Cole* v. *Parkin*, 12 East, 471.

the deed, does not subject it to a fresh stamp.

And the same rule was followed in another instance where the alteration was merely designed to correct an error, and did not spring from altered intention, though the error was not, as in the last case, of a nature wholly to prevent the deed from taking effect. Thus, in the case of *Robinson* v. *Touray*, 1 Mau. & Selw. 217, it was held, that a mistake in a policy of insurance made by the agent, in declaring the interest in the margin of the policy to be on a ship by a wrong name, might be rectified, by inserting the true name, without a fresh stamp*.

Error in fact allowed to be corrected.

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* Policies of marine insurance are under particular statutory regulations with respect to alterations subsequent to execution. The stat. 35 Geo. 3, c. 63, s. 13, provides that no additional stamp shall be requisite on account of any such alteration, if the premium shall exceed 10*s. per cent.*, and the thing insured shall remain the property of the same persons, and the alterations shall not prolong the term beyond the period al-

As to alterations in policies of assurance.

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[*purchaser*], and also the said [*first vendor*] and [*second vendor*] respectively, and their respective heirs, executors,

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In a case at *Nisi Prius* indeed, Lord *Kenyon* seems to have ruled that no additional stamp was rendered necessary by a memorandum indorsed on a deed several years subsequently to its execution, though the object of the alteration was to vary the stipulations of the deed. The facts were shortly as follow:—A. and B., the plaintiffs, being about to marry, the defendant agreed to advance 1000*l.* as a marriage portion; and, to secure it, the plaintiffs entered into a deed, dated the 1st of August, 1792, by which (among other things), they agreed to transfer 2000*l.* Three *per cents.* to the defendant; which was accordingly done. In January, 1798, a memorandum was indorsed on the deed, by which it was agreed, that the defendant should not transfer, or otherwise dispose of the stock, without giving six months' notice to the plaintiffs. This indorsement was not stamped. It was objected for the defendant, that, on this account, it could not be given in evidence. Lord *Kenyon* said, he was of opinion it did not require any stamp; and instanced the case of mortgage-deeds, in which it had formerly been customary to make indorsements, altering the rate of interest from 5*l.* to 4*l. per cent;* on which occasions a new stamp had not been held necessary. His Lordship therefore admitted it in evidence; and the plaintiff had a verdict. *Herne* v. *Hale*, 3 Esp. 237.

As this was a *Nisi Prius* decision only, and as great stress has, we have seen, generally in the recent cases been laid upon the fact of the alteration of the deed *not* having been the consequence of any new intention of the parties, as negativing its liability to a fresh stamp, it would not be safe to consider the case as an authority for the exemption, where the alteration arose from any change in or addition to the original intention or agreement of the parties, as in the instance before the Court, or that adverted to in the judgment. Indeed, no one would think of indorsing an agreement varying the rate of interest payable under a mortgage deed long since executed, without an additional stamp.

Alteration of deed, while *in fieri*, does not subject it to a fresh stamp.

It is clear, that an alteration made in a deed while it was in *fieri*, having been executed by some only of the parties to it, does not subject it to an additional stamp. Thus, in the case of *Matson* v. *Booth*, 5 Mau. & Selw. 223, where it appeared that, after a bail bond had been executed by

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lowed by the act, and so that no additional sum should be insured by reason of the alteration. And it has been held, that a change of destination from Quebec to St. John's, New Brunswick, was within the act, and therefore did not subject the policy to a new stamp. *Brockelbank* v. *Sugrue*, 1 Barn. & Adolph. 81; see also *Ramstrom* v. *Bell*, 5 M. & S. 267; *Kensington* v. *Inglis*, 8 East, 273.

administrators, and assigns, and the estate and effects of the said [*uncle*], deceased, for ever; *And also*, in consideration

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some of the bail, but before the bond had been accepted by the sheriff, the name of another obligor, with the concurrence of those who had executed it, was added; it was held that the bond was not rendered void by this alteration, and that no additional stamp was necessary; for never having been out of the hands of the obligors, the bond was to be considered, at the time of the addition, as in the nature of an escrow.

As to escrows.

The subject of escrows has been fully treated of under the title "Attestation," in the present Editor's edition of the second Volume of this work, p. 666 *a;* and therefore it will be sufficient to observe here, that the ancient doctrine has been much relaxed by modern adjudications; and it is now established, that, even if an instrument be executed as the *deed* of the party, and not in terms as an escrow, yet, if it be accompanied by an understanding or agreement for postponing its operation until some future event or period, this will constitute it an escrow. See *Johnson* v. *Baker*, 4 Barn. & Ald. 410; *Murray* v. Earl of *Stair*, 2 Barn. & Cress. 82, 3 Dowl. & Ryl. 278; *Matson* v. *Booth*, 5 Mau. & Selw. 223; *Hudson* v. *Revett*, 5 Bing. 368, stated *ante*, Vol. 2, p. 653 *c*, 2nd edit. Upon the same principle of liberality greater scope has been given than formerly to alterations made subsequently to the execution of the instrument, where they have been made with the privity of the parties interested, and without any fraudulent intention; and such alterations have been held not to affect the validity of the instrument in instances where, according to the old doctrine, they would certainly have had that effect*. *Waugh* v. *Russell*, 1 Marsh. 311; *Coke* v. *Brummell*, 2 J. B. Moore, 495; *Worral* v. *Jacob*, 3 Mer. 756; *Hudson* v. *Revett*, 5 Bing. 368; *Collins* v. *Prosser*, 1 Barn. & Cress. 682; 3 Dowl. & Ryl. 112; *Hall* v. *Chandless*, 12 J. B. Moore, 316; but see *Adams* v. *Buteson*, 3 Moor. & Pay. 339.

Alteration after execution, by *some* of the parties.

In these cases no question was raised as to the sufficiency of the stamp, with the exception indeed of *Hall* v. *Chandless*, which seems to have decided that an alteration made in a deed after its execution by some of the parties, who were not the principal agents in the transaction, being merely passive or concurring parties, *and were not interested in the alteration*, did not subject it to a fresh stamp. The circumstances were as follow:—A. had contracted to grant a lease to B., and C. had contracted to grant an underlease to C. and D. There being some difficulties with respect to the rents to be secured to A. and B., which induced A. to refuse to grant an immediate lease to the intended lessee, it was ar-

* This subject, as well as the kindred one as to the effect of deeds remaining in the hands of the grantor, is fully discussed, *ante*, Vol. 2, 2nd edit. 653 *b*, 666 *b*.

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of the sum of 100*l.* of like lawful money, residue of the said sum of 800*l.*, to the said [*first vendor*] and [*second vendor*]

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ranged that a lease should be granted by A. to E., upon trusts; and accordingly an indenture was prepared, by which A. demised to E., in trust for himself, until a certain rent agreed to be reserved to him by B. should be secured, and afterwards in trust for B., until a certain rent to be reserved to him by C. and D. should be secured, and afterwards in trust for C. and D. This lease had been executed by B., C., and D., (but not by A. or E.), when it was discovered that a piece of ground had been improperly included in it; whereupon an alteration was made in the parcels of the lease, by striking out certain words; and the indenture so altered was afterwards executed by A. and E., without any additional stamp being imposed. The alteration was made with the knowledge and at the request of B., but not with the privity of C. and D., who were not at all interested in it. On a case from Chancery the question for the opinion of the Court of Common Pleas was, whether the lease in question was a valid deed notwithstanding the alteration; and the Court certified that it was valid, the alteration not having been made after the execution by the lessor and lessee.

Several distinct transactions cannot be included in one stamp.

It is not allowable, except in the instances particularized in the stamp act, for persons to include in one stamp several distinct and unconnected transactions; and therefore, if A. owes B. a sum of money, and C. owes D. a sum of money, B. and D. could not take from their respective debtors a bond for the payment of their several debts by one instrument having only a single stamp, though the stamp were sufficient to cover a bond for the aggregate sum; and even if the obligee or the obligor were the same person, that is, if two creditors owing distinct independent debts bind themselves to their common debtor, (but not one for the other), or one debtor, owing to two different persons two distinct independent debts, becomes bound to his several creditors, by the same instrument, for the payment of the respective debts, it must bear a separate stamp for each obligation, there being no community of interest or purpose between the respective parties. Again, though it is clear that the legatees under a will may join in releasing the executor, in a deed bearing one stamp only, yet, if a person were executor under several wills, it is apprehended that the legatees under all the wills could not join in one deed of release, without subjecting the deed to a number of stamps equal to the number of wills. The distinction on this subject is thus stated in Phillipps on Evidence, Vol. 1, p. 490, 6th ed., in a passage which is often cited:—"If the interest of the parties relates to one thing, which is the subject-matter of the instrument, or, in other words, if the instrument affects the separate interests of several, and there is a community of the same subject-matter

at the same time paid by the said [*purchaser*], the payment and receipt of which said several sums of 700*l.* and 100*l.*,

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as to all the parties, there a single stamp will be sufficient; but where the parties have separate interests in several subject-matters, there ought to be a separate stamp for each party."

Assignment of shares in a common fund held to require one stamp only.

The first branch of this proposition may be illustrated by numerous cases. Thus, in the case of *Baker* v. *Jardine*, cited 13 East, 235, it was held that a bill of sale by several mariners, part of the crew of a privateer, of their respective shares of prize-money, did not require more than one stamp. So, in the case of *Davis* v. *Williams*, 13 East, 232, an agreement by several for a subscription to one common fund, *viz.* for making a wet dock at Bristol, though several as to each subscriber, was held to be admissible in evidence with a single stamp.

Agreement between assured and underwriters requires but one stamp.

The principle of these cases was recognised and acted on in the case of *Godson* v. *Forbes*, 6 Taunt. 171, where, in an action brought on a policy of insurance, the question was raised, whether an agreement for a reference, made between the assured (the plaintiff), on the one part, and all the underwriters who had subscribed the policy, on the other part, and the award made under that reference, were sufficiently stamped with a single stamp. It was contended, that these instruments required as many stamps as there were underwriters, being a distinct agreement and award as to each; but the Court held the single stamp on each to be sufficient. *Gibbs*, C. J., said—"We think it impossible to decide that, in the present case, more stamps than one were necessary, without disturbing decided cases. It was admitted by the counsel for the defendant, that, in a case of composition by an insolvent debtor with his creditors, only one stamp is necessary. There the different creditors have each a separate remedy against the insolvent debtor. They have no joint legal interest, yet it has been always considered, that, upon such a deed, one stamp is sufficient. Such deeds have always been received in evidence without objection; their legality has been acquiesced in on the principle, that all the creditors have a common interest in the joint fund. In the case of *Baker* v. *Jardine*, all the mariners in a vessel conveyed their interest in a prize to an agent. It was objected, that they had each a separate interest, and that there ought to be as many stamps as persons interested. It was answered, 'It is true, that, when the agent has sold a prize, each, claiming his share, must assert his claim separately; but they have a community of interest in the joint fund, on the proceeds of which each is hereafter to assert his separate claim; and that community of interest enables them to convey by one deed with one stamp.' Another case arose on the subscription to the Bristol Dock, in which a number of persons had subscribed an agreement, that each would subscribe the sum set against his respec-

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making together the sum of 800*l.*, they the said [*first vendor*] and [*second vendor*] do hereby respectively acknow-

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tive name. This was an agreement by several for a subscription to one common fund. There it was held, that one stamp was sufficient, because, though the parties might acquire separate interests, or subject themselves to separate obligations, yet, all contributed to one loan, and therefore one stamp sufficed. *Burrough*, of counsel for the defendant, admitted that he could not distinguish that case from *Baker* v. *Jardine*. In the present case, the agreement is between the assured and all the underwriters on the policy. All have an equal interest in the matter insured, all being equally interested in the preservation of it; for, if it is preserved, none of them are liable. It is true, that, in a Court of law, on the question, whether the assured had a claim on any one underwriter, his claim cannot be mingled with that of either of the others; but it is equally true that all have an equal interest in the question of the liability. Here, the parties agree to refer the question—What claims arise on the policy? and this, we think, is such a community of interest, that one stamp is sufficient."

Power of attorney by the members of a mutual insurance club held to require but one stamp.

So, in the case of *Allen* v. *Morrison*, 8 Barn. & Cress. 565, *S. C.* 3 Man. & Ryl. 70, where all the members of a mutual insurance club executed a power of attorney appointing certain persons their attornies, to execute policies of the ships admitted into the club; by virtue of which they signed each policy with the names of all the members except the owner of the ship; it was contended, that, as it was a several power given by each member of the club, there ought to have been a separate stamp for each; but the Court overruled the objection. Lord *Tenterden* observed—"There was certainly a community of purpose actuating all the members of this club, *viz.* that each should be insured by all the others. And although it may, perhaps, be said that there was not an entire community of interest, that is not sufficient to make several stamps necessary."

As to stamp on indenture of apprenticeship.

In coincidence with the principle of the preceding cases, it was lately held, that an indenture, by which an apprentice was bound for seven years, to serve A. B. for the first four years, and his own father for the last three, to learn two different trades, required one stamp only, the whole being one transaction. The *King* v. The Inhabitants of *Lowth*, 8 Barn. & Cress. 247, *S. C.* 2 Man. & Ryl. 273. Of course, a several bond with one condition, applicable to all the obligors, is only liable to one stamp.

One stamp on several bond, with same condition, held to be sufficient.

Thus, in the case of *Bowen* v. *Ashley*, 1 Bos. & Pul. New Rep. 274, see also 6 Taunt. 171, where a bond was executed by six persons, binding themselves severally, and their several heirs, &c., in a penalty, conditioned for the regular attendance of the obligors at a certain musical society, each being bound for the attendance of the others as well as himself;

ledge, and from the same do hereby respectively acquit and discharge the said [*purchaser*], his heirs, executors, admin-

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it was contended that the instrument ought to have borne six bond stamps; but the contrary was decided. Sir *James Mansfield*, C. J., said—"We are of opinion that one stamp only is sufficient, and that this case cannot be distinguished from several other cases in which only one stamp would be necessary. A common instance may be given, *viz.* where a debtor compounds with his creditors, and where each creditor signs the same deed, covenanting either to give further day of payment, or to take a certain sum as a composition. There, every covenant is, in fact, a separate covenant, and the several deed of each creditor who signs the deed; but the whole being only one transaction, a separate stamp for each person is never required. The same principle applies to this case. This was one transaction: it was not intended that one of these musicians should be bound unless all were bound; the engagement would never have been made with one of them, that he should perform by himself singly; but the binding of all of them to the same object was the consideration of the obligation entered into by each singly. We therefore think, that only one stamp was necessary. It does not follow from this determination, that persons may defraud the revenue by putting several bonds into one instrument, and with one stamp, as was stated in the argument. If that were to be done, and the persons who signed such bonds were severally bound, it would be a fraud; but here is no fraud."

Covenant to indemnify surety may be contained in same deed as the covenant of both.

It seems, that where two obligors execute a bond, one as principal and the other as surety, to a third person, and the principal, by the same deed, obliges himself to indemnify the surety against the consequences of this obligation, the whole may be included under one stamp. *Annandale* v. *Pattison*, 9 Barn. & Cress. 919, *S. C.* 5 Man. & Ryl.

Result of the cases.

The general result of the cases, therefore, seems to be in favour of the exemption of the instrument from a plurality of stamps, where its various objects may fairly be considered as parts of the same transaction. They certainly do not afford a criterion exactly applicable to many instances that might be suggested, in which it would be extremely difficult to say whether there was such "community of purpose" as to bring the transaction within the allowed compass of a single stamp. It is probable that the Courts, in forming their judgment of any particular case, would be much influenced by the consideration, whether it was consistent with convenience and the usual course of business, that the transaction should be comprised in one deed; and it would not be safe to consider the preceding cases as authorizing any conclusion at variance with either.

Agreement for letting farms

Of course, where a landed proprietor enters into a general agreement with his tenantry, for the letting of their respective farms*, the terms of

* *Vide* form of lease, *ante*, Vol. 4, p. 556.

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istrators, and assigns, for ever, *They* the said [*first vendor*] and [*second vendor*] *Have*, and each of them *Hath*, granted,

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requires a separate stamp for each demise.

letting, except with regard to rent, being the same as to all, and the tenants' names are arranged in columns, with the respective rents set opposite to their names, the instrument operating as a separate demise or letting as to each tenant, requires a separate stamp for each; for, the circumsance of the several agreements being contained on one piece of paper instead of many, cannot vary the construction or the stamp. *Doe* d. *Copley* v. *Day*, 13 East, 241. Indeed, no attempt was made to deny the liability of the instrument to several stamps, in this case; the only question being, whether a single stamp, which had been affixed to the instrument, could be connected with the contract with the tenant against whom the action was brought, and near whose name it was placed, so as to render the instrument admissible as evidence of such contract; and the Court was of opinion, that, as the stamp had been recently impressed, and there appeared to be no dispute with any other tenant, it might be so considered. The obvious alternative rule, in such cases, and which would prevail in the absence of evidence appropriating the stamp to any one particular transaction, would be to consider the stamp as applicable to the person *first* named; for, in a case where several persons had been admitted to the freedom of a corporation upon one stamp, the admission of the person first named was held to be good, and that of all the rest to be void. See Anon. case, cited in *Gilby* v. *Lockyer*, Doug. 271.

Stamp governed by the legal effect of the instrument.

It remains only to be observed, that the stamp is governed by the legal effect of the instrument, and not by the form which has been given to it by the erroneous opinion of the parties respecting its operation. Thus, on the one hand, an instrument assuming the language of a conveyance, but which, from its not being under hand and seal, operated simply as an agreement, has been held to be sufficiently stamped with an agreement stamp; while, on the other hand, an instrument in terms expressed as an agreement, but which in point of construction was adjudged to be a surrender, has been held to require the stamp applicable to a surrender. An instance of the former kind is afforded by the case of The *King* v. Inhabitants of *Ridgwell*, 6 Barn. & Cress. 665; *S. C.* 9 Dowl. & Ryl. 678, where, in order to establish a derivative settlement for a pauper, an instrument to the following effect was offered in evidence, bearing a 20*s.* agreement stamp. It was intitled—An agreement made &c., between A. B. the elder, of the one part, and A. B. the younger, of the other part; whereby A. B. the elder, in consideration of the affection which he bore to his son A. B. the younger, and for the further consideration of 19*l.* 19*s.*, did absolutely remise, release, and for ever quit claim unto his son A. B. the possession of a moiety of a certain tenement (describing it), To hold to his said son, and to his heirs and assigns for ever, concluding as follows:—"And I

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bargained, sold, and released, and by these presents *Do*, and each of them *Doth*, grant, &c., unto the said [*purchas-*

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the said A. B. the elder, nor my heirs, nor any other person or persons for me or them, or in my or their names, or in the right or stead of any of them, shall or will, by any ways or means hereafter, have, claim, challenge, or demand any estate, right, title, or interest, be it by last will or testament or otherwise, of, in, or to the said premises, or any part or parcel thereof, but from all and every action, right, title, interest, or demand of, in, or to the said premises, or any part thereof, they and every of them shall be utterly excluded and barred for ever." It was contended, that as the parties intended this instrument as an instrument of conveyance, it ought to have borne the stamp of 1*l.* 10*s.* imposed by the statute of 44 Geo. 3, c. 98, on every deed, instrument of conveyance, &c.; but the Court held that the stamp was sufficient. Mr. Justice *Bayley* said—"Whether the stamp of 1*l.* was the appropriate stamp for this instrument, depends on the legal effect of the instrument itself. The stamp act now in force [*quære* the act in force when the instrument was executed,] imposes a duty of 30*s.* on every deed or other instrument of conveyance, surrender, lease, release, grant, appointment, confirmation, assignment, transfer, covenant, or any other obligatory instrument (not otherwise charged in the schedule), which may be enrolled. This is not a deed because it is not under seal. It purports to operate as a conveyance of land; but it cannot so operate because it is not a deed*. It is not, therefore, a release, grant, &c. Then the only question is, does it fall within the other words 'any obligatory instrument (not otherwise charged).' In what respect is this an obligatory instrument? It does not divest the father of his interest in any portion of the land which it purports to convey. There is one clause by which the father stipulates not to claim any estate or interest in the premises which the interest purports to convey, and I think that that operates as an agreement by the father not to disturb the son in the enjoyment of the premises. This instrument does not operate as a conveyance of the land, but merely by way of agreement. The stamp affixed to it therefore was the proper one, and that being so, it ought to have been received in evidence."

The case alluded to as supplying an example of an instrument in terms expressed as an agreement, but which was construed to be, and therefore required to be stamped as, a surrender, is *Williams* v. *Sawyer*, 6 J. B. Moore, 226, where a written agreement was given in evidence, by which P. agreed to deliver up the immediate possession of the principal part of

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* If it had been under seal it might have operated as a covenant to stand seised. *Ante*, Vol. 1, p. 452.

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All such parts of hereditaments described as are freehold.

er] and his heirs, (in the actual possession of the said [*purchaser*] now being, by virtue of a bargain and sale thereof made to him by the said [*first vendor*] and [*second vendor*], in consideration of 5*s.*, &c.), *All such* and so many and such part and parts as is or are freehold or charterhold of and in all and singular the messuages or tenements, lands, hereditaments, and other the premises hereinbefore described or mentioned, and comprised in the said indenture hereinbefore

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the farm he held to his lessor (the plaintiff), who, in consideration thereof, agreed to purchase the stock &c., and to make compensation for the fallows, which the plaintiff was to enter upon immediately, and P. was to be permitted to hold one half of the barns &c. for three months. This instrument was stamped with an agreement stamp of 20*s.*, but it was objected that as, in point of fact, it amounted to a surrender of the term, it required a stamp of 1*l.* 15*s.* by the statute 55 Geo. 3, c. 184, Sched. Part 1, tit. "*Surrender*"*. On the other side it was contended, that, although no precise form is necessary to shew a surrender in terms†, yet, in order to constitute such surrender, the whole possession must be given up at the time; and here, as P. was allowed to remain in possession of part of the farm, it was a mere agreement, and not a formal surrender. But the Court was of opinion that the instrument operated as a surrender, it being quite clear that a party may surrender his interest in one part of the lands immediately, and the other part on a subsequent day; and therefore the objection to the stamp was well founded. *Vide* also cases stated *ante*, Vol. 4, p. 332, *et seq.*

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* The clause imposing the stamp duty on surrenders, is as follows—

Stamp upon surrenders.

"Surrender upon the sale of lands or other property. See *Conveyance.*

"Surrender (not otherwise charged in this schedule, nor expressly exempted from all stamp duty), of any term or terms of years, or of any freehold or uncertain interest, in any lands, hereditaments or heritable subjects, not being of copyhold or customary tenure, 1*l.* 15*s.*

"And where the same, together with any schedule, receipt, or other matter, put or indorsed thereon, or annexed thereto, shall contain 2160 words, or upwards, then for every entire quantity of 1080 words contained therein, over and above the first 1080 words, a further progressive duty of 1*l.* 5*s.*

"Surrender of copyhold lands or tenements. See *Copyhold and Mortgage.*"

Vide this doctrine illustrated, *ante*, p. 115.

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recited, with their appurtenances; *And* of and in all outhouses, edifices, buildings, barns, stables, gardens, orchards, feedings, woods, underwoods, timber and other trees, commons, and commonable rights, hedges, ditches, fences, mounds, ways, paths, waters, watercourses, liberties, privileges, easements, profits, commodities, advantages, and emoluments whatsoever to the said messuages or tenements, lands, and other hereditaments, or any of them respectively belonging, or in anywise appertaining, or reputed to belong or appertain, or held, occupied, or enjoyed with or as parcel or member of the same or any of them respectively; *And* of and in the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of the said messuages or tenements, lands and hereditaments, with their and every of their rights, members, and appurtenances; *And* all the estate, right, title, interest, use, trust, inheritance, property, possession, benefit, and equity of redemption, claim, and demand whatsoever, of the said [*first vendor*] and [*second vendor*] respectively, of, in, to, from, or out of the said premises, with their appurtenances; TO HAVE AND TO HOLD the said messuages or tenements, lands, hereditaments, and all and singular other the premises hereby released or intended so to be, with their appurtenances, unto the said [*purchaser*], his heirs and assigns, (*To uses to prevent dower*, ut ante, Vol. 7, p. 461). AND THIS INDENTURE ALSO WITNESSETH, that, for the considerations hereinbefore expressed (*g*), *She*, the said [*first vendor*], as to and concerning one undivided moiety or half part of the copyhold hereditaments hereinafter covenanted to be surrendered, and the acts and deeds relating thereto, and not further or otherwise, doth hereby for herself, and for her heirs, executors, and administrators, *And* the said [*second vendor*], as to and concerning the other undivided moiety or half part of the said copyhold hereditaments, and the acts and deeds relating thereto, and not further or otherwise, doth hereby for her-

General words.

And all the estate, &c.

Habendum.

Further *testatum.*

Vendors covenant to surrender copyholds.

(*g*) As the payment of the consideration money applicable to the copyholds appears on the face of the surrender, which bears also the *ad valorem* duty, some practitioners do not, as is the *more usual practice*, state the fact also in the covenant to surrender. *Vide ante*, pp. 37, 107.

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self, and for her heirs, executors, and administrators, covenant and agree with the said [*purchaser*], his heirs and assigns, that they the said [*first vendor*] and [*second vendor*] respectively, or their respective heirs, shall or will, on the request and at the costs and charges of the said [*purchaser*], his heirs or assigns, well and effectually surrender into the hands of the lord of the said manor of ——, according to the custom of the said manor, To the use of the said [*purchaser*], his heirs and assigns for ever, *all* such and so many and such part and parts of the messuages or tenements, lands, hereditaments, and premises hereinbefore mentioned or described, as is or are of copyhold or customary tenure, with the appurtenances, *To the intent* that the said [*purchaser*], his heirs or assigns, may be admitted tenant or tenants of the said copyhold hereditaments, To hold the same to him, his heirs and assigns, for ever, at the will of the lord of the said manor, by copy of court roll, according to the custom of the same manor, and by and under the rents, suits, and services therefore due, and of right accustomed to be paid and performed; and that, in the meantime, and until such surrender shall be made and perfected, they the said [*first vendor*] and [*second vendor*] respectively, and their respective heirs, shall stand and be seised or possessed of the said copyhold hereditaments, with the appurtenances, Upon trust for the said [*purchaser*], his heirs and assigns. AND the said [*first vendor*], as to and concerning one undivided moiety of the said freehold and copyhold hereditaments, and the acts and deeds relating thereto, and not further or otherwise, doth hereby, for herself and her heirs, executors, and administrators; *And* the said [*second vendor*], as to and concerning the other undivided moiety of the same hereditaments, and the acts and deeds relating thereto, and not further or otherwise, doth hereby, for herself and for her heirs, executors, and administrators, covenant, promise, and agree to and with the said [*purchaser*], his heirs and assigns, in manner following, that is to say, That, notwithstanding any act, deed, matter, or thing whatsoever, made, done, committed, or suffered to the contrary by them the said [*first vendor*], and [*second vendor*], or either of them, or by the said [*uncle*], their uncle, deceased, (except as hereinafter is excepted), they the said [*first vendor*] and [*second vendor*], or one of them, now

Vendors, each as to her own moiety, covenant with purchaser

—That, notwithstanding &c., they have power to convey.

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have or hath good right, full power, and lawful and absolute authority to grant, release, surrender, and assure the said freehold and copyhold messuages or tenements, lands and hereditaments, respectively hereby released and covenanted to be surrendered, or intended so to be, with the appurtenances, to the uses and in manner aforesaid, according to the true intent and meaning of these presents; *And also*, that the said freehold hereditaments hereby released, or intended so to be, shall henceforth, and at all times hereafter, remain, continue, and be to the uses, upon the trust, and for the intents and purposes hereinbefore expressed concerning the same; and the rents and profits thereof shall and may be received and taken accordingly; *And also*, that it shall be lawful for the said [*purchaser*], his heirs and assigns, from time to time, and at all times for ever hereafter, to enter into, hold, and enjoy, and receive and take the rents and profits of the said copyhold hereditaments hereby covenanted to be surrendered, according to the custom of the manor of——, as well in respect of the said freehold as of the said copyhold hereditaments, without any hindrance or denial whatsoever of, from, or by them the said [*first vendor*] and [*second vendor*], or either of them, their or either of their heirs, or any other person or persons whomsoever rightfully claiming by, from, through, under, or in trust for them or either of them, or by, from, through, under, or in trust for the said [*uncle*], deceased, other than and except as hereinafter excepted; *And* that free and clear of and from all former and other adverse estates, titles, troubles, charges, and incumbrances whatsoever, at any time or times heretofore, and to be at any time and from time to time hereafter, had, made, done, committed, or suffered by the said [*first vendor*] and [*second vendor*], or either of them, or by the said [*uncle*], deceased, or by any person or persons whomsoever rightfully claiming by, from, through, under, or in trust for him, them, or any of them, (save only and except as appears by the recitals hereinbefore contained) (*h*); *And moreover*, that they the said

That premises shall remain to the uses aforesaid.

Free from incumbrances;

And for further assurance.

(*h*) A term of years assigned to attend the inheritance ought never to be excepted in the covenant against incumbrances, unless it was created by a person to whose acts the vendor's covenants extend, and unless its creation appears for other purposes on the face of the conveyance; for,

As to noticing attendant terms of years in the covenant against incumbrances.

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[*first vendor*] and [*second vendor*] respectively, and their respective heirs, and all other persons whosoever rightfully claiming any estate, right, title, trust, or interest, of, in, to, or out of, or upon the said messuages or tenements, lands and hereditaments, respectively, hereby released and covenanted to be surrendered, or intended so to be, by, from, under, or in trust for either of them, or by, from, through, under, or in trust for the said [*uncle*], deceased, shall and will, at all times hereafter, upon every request, and at the costs of the said [*purchaser*], his heirs, appointees, or assigns, make, do, and execute, or cause or procure to be made, done, and executed, all such further grants, acts, deeds, conveyances, surrenders, and assurances in the law whatsoever, for the more effectually granting, releasing, surrendering, confirming, or otherwise assuring the said messuages or tenements, lands, and hereditaments, respectively, hereby released and covenanted to be surrendered, or intended so to be, with the appurtenances, To the uses and upon the trusts hereinbefore limited and declared of or concerning the same, according to the true intent and meaning of these presents, as by the said [*purchaser*], his heirs, appointees, or assigns, or his or their counsel learned in the law shall be reasonably devised, or advised and required, and be tendered to be made, done, and executed. AND THIS INDENTURE ALSO WITNESSETH, that, for the considerations hereinbefore expressed, and also in consideration of 10*s.*, of lawful money current in Great Britain to the said [*mortgagee*] paid by the said [*trustee of term*] immediately before the execution of these presents, the receipt whereof is hereby acknowledged,

Further *testatum.*

For considerations aforesaid, mortgagee assigns to purchaser's trustee.

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otherwise, the exception defeats, by the disclosure of the term, the object of the precaution usually taken of assigning the term by a separate deed. Indeed, some practitioners think it improper to refer to the term as an incumbrance in *any* case, because it is attendant on the inheritance, and is treated by the purchaser who keeps it on foot as a protection. The term, however, is a subsisting *legal* estate, and though the trust is declared to be in favour of the purchaser, this is merely matter of equitable cognizance, and therefore it seems difficult to condemn the practice of noticing the term as positively incorrect. However, as the instances where this is proper to be done are few compared to those in which it would be injurious, it seems better to adopt the general rule of never noticing it.

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He the said [*mortgagee*], on the nomination of the said [*purchaser*], and at the request and by the direction of the said [*first vendor*] and [*second vendor*], testified as aforesaid, *Hath* bargained, sold, assigned, transferred, and set over, and by these presents *Doth* bargain, sell, assign, transfer, and set over unto the said [*trustee of term*], his executors, administrators, and assigns, *All* such and so many and such part and parts of the freehold messuages, lands, tenements, hereditaments, and premises hereinbefore released, or intended so to be, as are comprised in the said term of five hundred years, so as aforesaid granted to the said [*mortgagee*] by the said indenture hereinbefore recited, and every part of the same, with the appurtenances; *And* all the estate, right, title, interest, term and terms of years yet to come and unexpired, trust, property, possession, claim, and demand whatsoever of him the said [*mortgagee*], in, to, or out of the premises, with the appurtenances; TO HAVE AND TO HOLD the said lands, hereditaments, and premises hereby assigned, or intended so to be, and every part of the same, with their appurtenances, unto the said [*trustee of term*], his executors, administrators, and assigns, from henceforth for and during all the residue and remainder of the said term of five hundred years therein now to come and unexpired; but nevertheless UPON TRUST for the said [*purchaser*], his heirs, appointees, and assigns, and to be assigned and disposed of from time to time as he or they shall direct or appoint, and in the meantime to attend, wait upon, and go along with the freehold reversion and inheritance of the said hereditaments, and to protect the same from and against all charges and incumbrances, if any, mesne and subsequent to the creation of the same term, and upon no other trust whatsoever. *(Covenant by mortgagee with trustee that he has not incumbered).* IN WITNESS, &c.

Parcels.

And all the estate, &c.

Habendum for residue of term,

—in trust for purchaser, and to attend the inheritance.

COPYHOLDS UNDER A BANKRUPTCY.

DEED *of* BARGAIN *and* SALE *of* COPYHOLDS, *Part of a* BANKRUPT'S ESTATE, *by the* COMMISSIONERS, *with the Concurrence of the* ASSIGNEES *and a* MORTGAGEE, *to a* PURCHASER; *and Authority to a third Person to* SURRENDER *to the* PURCHASER (*a*).

Parties.

THIS INDENTURE, made the —— day of ——, in the year of our Lord 18—, BETWEEN [*commissioners*], of &c.,

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As to conveyances of the copyhold estates of bankrupts.

(*a*) Before the late bankrupt act of 6 Geo. 4, c. 16, it was usual to except copyholds out of the bargain and sale to the assignees, and for the commissioners to convey them when sold directly to the purchaser, who was admitted at the lord's court upon that conveyance, without any actual surrender; and this practice was sanctioned by the stamp act, 55 Geo. 3, c. 184, Schedule, Part 1, tit. "*Conveyance;*" which provides that, "where any copyhold or customary estate shall be conveyed by a deed of bargain and sale, *by the commissioners named in a commission of bankrupt*, or by executors or others by virtue of a power given by will, or by act of Parliament, or otherwise *where a surrender shall not be necessary*, the deed of bargain and sale shall be deemed the principal instrument." But, by the statute of 6 Geo. 4, c. 16, s. 68, it is enacted, that "the commissioners shall have power by deed indented and enrolled in any of his Majesty's Courts of record, to make sale for the benefit of the creditors of any copyhold or customaryhold lands, or of any interest to which any bankrupt is entitled therein, *and thereby to entitle or authorize any person or persons on their behalf to surrender the same, for the purpose of any purchaser or purchasers being admitted thereto.*" It is clear, therefore, that this enactment makes it now necessary that there should be a deed of bargain and sale of the copyhold estate of a bankrupt, from the commissioners to the purchaser, and also an actual surrender of the estate by some person to be authorized by the commissioners for that purpose. A question has arisen, whether the *ad valorem* duty payable on the transaction should be impressed on the bargain and sale, or on the surrender. Upon this point opinions differ. It appears to the Editor, that the bargain and sale ought to bear the stamp, and for the following reasons: The stamp act for all purposes has made the surrender the principal instru-

the major part of the commissioners named and authorized in and by a commission of bankrupt awarded and issued

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ment in regard to copyholds, so far as it was possible to do so, having in the instance under consideration imposed the *ad valorem* duty on the bargain and sale, only because at that time no surrender was used in such cases, as appears by the terms of the clause in question, *which expressly confine it to cases in which no surrender shall be necessary.* Hence it should seem, that the late bankrupt act, by imposing the necessity of a surrender in the case of the sale of a bankrupt's copyholds, has taken it altogether out of the clause in the stamp act, which places the duty on the bargain and sale, and has brought the transaction within the next clause of that act, which provides that "in *other* cases of copyhold or customary estates the surrender or voluntary grant, or the memorandum thereof respectively, if made out of Court, or the copy of court-roll of the surrender or voluntary grant if made in Court, shall be deemed the principal instrument." If this view of the matter is correct, the deed of bargain and sale is only liable to the common deed-stamp of 1*l.* 15*s.* Indeed, it has been suggested to the Editor, whether, as the bankrupt act empowers the commissioners by deed "to make sale of," but not to convey, the bankrupt's copyhold lands, the deed of bargain and sale is not to be considered merely as evidence of a contract for sale, and as such exempt from stamp duty, under the 98th section of the bankrupt act. The contrary, however, seems to be clear, as the clause in question was evidently framed for the exoneration of bankrupts' estates, and not for the advantage of purchasers; besides, the sales of bankrupts' estates are expressly exempted from *auction* duty, and *expressio unius est exclusio alterius.* All these difficulties have arisen entirely from the alteration introduced by the late bankrupt act, in superadding the requisition of an actual surrender to the deed of bargain and sale, which was antecedently used without any such concomitant. The additional trouble and expense which it has occasioned are much complained of. As the policy of the Legislature of late years has been to facilitate the transfer of property as much as possible, and as, in one instance, an act has been passed for the sole purpose of *taking away* the necessity of a surrender of copyholds, (*vide* stat. 55 Geo. 3, c. 192, *ante*, Vol. 3, p. 533), it is singular that, in the present case, in dereliction of this policy, a new and onerous clog on alienation should have been imposed, and that by the abolition of an established practice, from which no inconvenience was found to arise.

Since writing the preceding observations, it has been mentioned to the Editor, that the officers of the enrolment office in Chancery hesitate to receive a bargain and sale of copyholds from the commissioners of bankrupt to a purchaser unless it bears the *ad valorem* stamp, conceiving that

COPYHOLDS UNDER A BANKRUPTCY.

against [*bankrupt*], late of ——, in the county of ——, dealer and chapman, of the first part; [*assignees*], of &c., of the second part; [*mortgagee*], of &c., of the third part; the said [*bankrupt*], of the fourth part; [*purchaser*], of &c., of the fifth part; and [*person authorized to surrender*], of &c., of the sixth part: WHEREAS, at a court holden for the manor of ——, in the said county of ——, on the —— day of ——, the said [*bankrupt*] was admitted tenant to the hereditaments hereinafter particularly described, and hereby bargained and sold, or intended so to be, To hold the same unto the said [*bankrupt*], his heirs and assigns, for ever; AND WHEREAS, by an indenture bearing date the —— day of ——, and made between the said [*bankrupt*], of the one part; and the said [*mortgagee*], of the other part; the said [*bankrupt*], in consideration of the sum of 4000*l.* then lent and advanced to him by the said [*mortgagee*], did covenant to surrender into the hands of the lord of the said manor, All and singular the hereditaments whatsoever of him the said [*bankrupt*], holden of the said manor, and described, the particulars whereof are stated in the thereunder written schedule (which schedule comprises the hereditaments hereinafter particularly described, and hereby bargained and sold, or intended so to be), To the use of the said [*mortgagee*], his heirs and assigns, upon certain trusts, for securing to the said [*mortgagee*], his executors, administrators, and assigns, the payment of the sum of 4000*l.* then advanced and lent by the said [*mortgagee*] to the said [*bankrupt*], with interest for the same; but no surrender was ever made or executed in pursuance of the said last-mentioned covenant; AND WHEREAS, on the —— day of ——, a commission of bankrupt under the great seal of Great Britain was awarded and issued against the said [*bankrupt*], and he was thereupon duly found and declared a bankrupt, And the said [*assignees*] were duly chosen assignees of the estate and effects of the said bankrupt; And by an indenture of bargain and sale, bearing date the —— day of ——, all the freehold hereditaments of the said bankrupt were duly ordered, bargained, and sold by the said [*commissioners*], acting commissioners under the said commission of bank-

Recital of bankrupt's admission.

Recital of mortgage.

Commission of bankrupt.

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it (and not the surrender) ought to bear the stamp. The practice is clearly erroneous.

rupt, together with the assignees provisionally appointed of the said freehold hereditaments, unto the said [*assignees*] and their heirs, In trust for the creditors of the said bankrupt seeking relief under the said commission; but the copyhold hereditaments hereinafter particularly described, and hereby bargained and sold, or intended so to be, were not included in the said indenture of bargain and sale, nor has any other bargain and sale been made thereof; AND WHEREAS the said [*assignees*], in pursuance of the powers vested in them as assignees of the estate of the said bankrupt, chosen as aforesaid, and by the order and direction of the said [*commissioners*], the major part of the commissioners named in the said commission, and at the request and with the consent and approbation of the said [*mortgagee*], caused the said hereditaments hereinafter described, and hereby bargained and sold, or intended so to be, to be put up to sale by public auction (together with other parts of the estate of the said bankrupt), at the —— inn, in —— aforesaid, on the —— day of —— now last past; at which sale the said [*purchaser*] became and was declared to be the highest bidder for the same, and the purchaser thereof at the sum of 100*l.*, and thereupon paid into the hands of the said [*assignees*] the sum of 10*l.*, by way of deposit and in part of the said purchase money, conformably to the conditions of the said sale. NOW THIS INDENTURE WITNESSETH, that, in consideration of the sum of 10*l.*, so paid by the said [*purchaser*] to the said [*assignees*] at the time of the said sale, by way of deposit and in part of the said purchase-money as aforesaid, and of the further sum of 90*l.* of lawful money of Great Britain and Ireland, other part and in full of the said purchase-money, in hand paid by the said [*purchaser*] to the said [*assignees*] (*b*), by the direction and with the privity and consent of the said [*mortgagee*] and [*bankrupt*], (testified by their severally executing these presents), the payment of which several sums of 10*l.* and 90*l.* in the manner aforesaid, making together the sum of 100*l.*, and that the same is in full for the absolute purchase of the heredita-

COPYHOLDS UNDER A BANKRUPTCY.

Contract for sale by auction.

Testatum.

In consideration of purchase-money, commissioners bargain and sell, and assignees, mortgagee, and bankrupt, release to purhaser,

(*b*) Here the purchase-money is expressed to be paid to the assignees, and not to the mortgagee. This, of course, would be mere matter of arrangement between the parties.

COPHOLDS UNDER A BANKRUPTCY.

ments hereinafter described, The said [*assignees*] do hereby acknowledge, and from the same *Do*, and each of them *Doth* acquit and discharge the said [*purchaser*], his heirs, executors, administrators, and assigns by these presents; And also in consideration of the sum of 10*s.* of like lawful money to each of them the said [*commissioners*], [*mortgagee*], and [*bankrupt*], paid by the said [*purchaser*], immediately before the execution of these presents, the receipts whereof respectively are hereby acknowledged, They the said [*commissioners*], (with the privity and consent, and by the direction and appointment of the said [*assignees*], [*mortgagee*], and [*bankrupt*], testified as aforesaid, *Have* ordered, bargained, and sold, and by these presents *Do* order, bargain, and sell, And the said [*assignees*], with the privity and consent of the said [*mortgagee*] and [*bankrupt*], testified as aforesaid, and in pursuance and in exercise of the power and authority for this purpose vested in them as assignees chosen as aforesaid, and according to their estate and interest as such assignees in the hereditaments hereinafter described, and not further or otherwise; *And also* the said [*mortgagee*], by the direction of the said [*assignees*], as assignees chosen as aforesaid, testified as aforesaid, and according to his estate and interest as such mortgagee in the hereditaments hereinafter described, and so far as he can or ought to do at law or in equity, but not further or otherwise, *Have*, and every of them *Hath* remised, released, and confirmed, and by these presents *Do*, and every of them *Doth* remise, release, and confirm, And the said [*bankrupt*] *Hath* ratified and confirmed, and by these presents *Doth* ratify and confirm unto the said [*purchaser*] and his heirs, ALL THAT *(parcels)*, Together with all and singular the rights, members, and appurtenances to the said hereditaments hereby bargained and sold, or intended so to be, or any part thereof, belonging or in anywise appertaining; And the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits thereof; And all the estate, right, title, interest, trust, possession, property, claim, and demand whatsoever, both at law and in equity, of them the said [*commissioners*], [*assignees*], [*mortgagee*], and [*bankrupt*], and each and every of them, in and to the same premises; TO HAVE AND TO HOLD the said heredita-

Parcels.

—all the estate, &c.

Habendum to purchaser in fee.

ments hereby bargained and sold, or otherwise assured, or intended so to be, with the appurtenances, freed and absolutely discharged of and from the said hereinbefore recited mortgage, unto and to the use of the said [*purchaser*], his heirs and assigns, for ever, subject nevertheless to the rents and services accustomed to be paid and performed, in respect of the same hereditaments, to the lord of the said manor of ——. AND THIS INDENTURE ALSO WITNESSETH, that, for the considerations aforesaid, the said [*commissioners*], at the request and on the nomination of the said [*purchaser*], testified as aforesaid, do by these presents authorize and empower the said [*person authorized to surrender*] personally to appear at the next or any subsequent court to be holden for the said manor of ——, and then and there, in the names and on the behalf of the said [*commissioners*], as commissioners as aforesaid, to surrender the said hereditaments hereinbefore bargained and sold, or intended so to be, with the appurtenances, into the hands of the lord of the said manor, *To the use* of the said [*purchaser*], his heirs and assigns, *To the intent* and purpose that the said [*purchaser*] may be admitted tenant of the hereditaments, *To hold* the same to him, his heirs and assigns, for ever, at the will of the lord, according to the custom of the said manor. *(Covenant by assignees, mortgagee, and bankrupt, that they have not incumbered,* "except as appears by these presents" (*c*)*).* IN WITNESS (*d*), &c.

COPYHOLDS UNDER A BANKRUPTCY.

Further *testatum.*

Commissioners nominate a person to surrender to the purchaser.

(*c*) The words in inverted commas ought to be introduced, because the bankrupt who made the recited mortgage is included in this covenant, for here he does not enter into the usual vendor's covenants, *ut ante*, Vol. 7, p. 570.

(*d*) This deed must be enrolled. Bargains and sales by commissioners of bankrupt are not required to be enrolled within six months, as are bargains and sales under the stat. of 27 Hen. 8, c. 16, with which they are sometimes confounded in this respect.

BY TENANT FOR LIFE, FOR A TERM DETERMINABLE ON HIS DECEASE.

DEMISE *by a* TENANT *for* LIFE *to a* PURCHASER, *for* ONE HUNDRED YEARS, *if the* VENDOR *so long* LIVED. *Special* COVENANTS *respecting the Power of* GRANTING LEASES, FELLING TIMBER, *&c. (Variation where the Conveyance is of the* WHOLE ESTATE FOR LIFE) (*a*).

Parties.

Recital of settlement.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the one part; and [*purchaser*], of &c., of the other part. WHEREAS, by indentures of

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Effect of alienation by tenant for life, upon his power of leasing.

(*a*) A reversion is left in the vendor, for the purpose of preserving his powers, pursuant to a suggestion, Sugd. Pow. 5th ed. 54. But, according to the case of *Long* v. *Rankin*, stated *ante*, Vol. 2, p. 313, 2nd ed., there seems to be no necessity for this precaution, since that case decided that a power of leasing might be exercised by a tenant for life who had alienated his whole estate, unless the author of the power had indicated an intention, in a special manner, to annex it inseparably to the estate for life. In *Long* v. *Rankin*, however, there was an express stipulation that the tenant for life, notwithstanding his alienation, (the purpose of which was to secure an annuity), should be at liberty to grant leases; and it does not follow that the principle of the case would apply where there was no such stipulation. As it seems, therefore, that, in such a case as the present, the power would remain annexed to the person of the grantor, and would not pass, with the estate, to the alienee, or become suspended, the clauses of the precedent in the text would be, for the most part, applicable to a deed of conveyance comprising the whole estate for life of the vendor. But, independently of the object of preserving the powers, there might be a purpose for which a tenant for life, who has sold his beneficial interest, might wish to retain the *freehold*—as, that of enabling the next tenant in tail in remainder (probably his eldest son) to acquire the fee-simple by suffering a common recovery. In the instance, too, of a very small property, a purchaser of a life estate might choose to take a grant of a determinable term, as a less expensive mode of assurance than any which would operate to transfer the *freehold*, unless the vendor has a power of appointment, which is seldom possessed by a tenant for life over his life estate.

lease and release, bearing date respectively the —— and —— days of ——, which were in the year ——, the release being of seven parts, and made, or mentioned to be made, between [*father*], (the father of the said [*vendor*], now deceased), of the first part; the said [*vendor*], party hereto, by the description of [*vendor*], the younger, the only son of the said [*father*], of the second part; [*wife*], of &c., of the third part; and various other persons, of the remaining parts (*b*); being the settlement executed previously to the marriage of the said [*vendor*], (party hereto), with the said [*wife*], (his now wife), in consideration of such marriage, and for other the considerations therein expressed, all and every the manors or reputed manors, messuages, farms, lands, tenements, and hereditaments hereinafter described, and intended to be hereby demised (*c*), with their appurtenances, (amongst and together with divers other hereditaments), were conveyed and do now stand limited *To the use* of the said [*vendor*], party hereto, and his assigns, during the term of his natural life, without impeachment for any manner of waste, with divers remainders over; in which said indenture of release is contained (amongst other powers therein mentioned,) a power enabling the said [*vendor*], (party hereto), and the several other tenants for life under the limitations therein contained, as they should respectively come into and be in possession of the estates thereby settled, from time to time during their respective enjoyments thereof, to demise the same for any term or terms of years not exceeding twenty-one years, in such manner and under such restrictions as were therein mentioned; AND WHEREAS the said [*purchaser*] hath contracted with the said [*vendor*], (party hereto), for the absolute purchase of the said manors and reputed manors, messuages, farms, lands, tenements, and hereditaments hereinbefore mentioned, and intended to be hereby demised, with their respective appurtenances, for

BY TENANT FOR LIFE, FOR A TERM DETERMINABLE ON HIS DECEASE.

Contract for purchase.

(*b*) Where the recited deed has numerous parties, most of whom are joined for purposes extraneous to the object of the recital, it is convenient to refer to them in this manner.

(*c*) If the conveyance is to be of the whole life estate—

" released."

BY TENANT FOR LIFE, FOR A TERM DETERMINABLE ON HIS DECEASE.

the term of one hundred years, determinable with (*d*) the life of the said [*vendor*], (party hereto), and of all his right, power, and authority whatsoever, under and by virtue of the said indenture of settlement, of felling and cutting down all and every the woods, timber and other trees standing, growing, and being, or to stand, grow, or be, in or upon the same premises, or any part thereof, (*e*) for the said term, determinable as aforesaid, and of settling and disposing of and converting the same for the sole use of him the said [*purchaser*], in the manner and subject to the condition and agreement hereinafter mentioned; together with the benefit of the said power of leasing, and of all other powers, rights, and authorities reserved to him the said [*vendor*], (party hereto), in, over, and upon the said several hereditaments, by the said recited indentures, (except the several powers of jointuring and making provision for younger children, therein contained), at or for the price or sum of ——. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said recited contract, and in consideration of the sum of —— of lawful money of Great Britain and Ireland, by the said [*purchaser*] to the said [*vendor*], (party hereto), paid at or before the sealing and delivery of these presents, the receipt of which said sum of —— he, the said [*vendor*], doth hereby acknowledge, and therefrom doth absolutely discharge the said [*purchaser*], his heirs, executors, administrators, and assigns, He, the said [*vendor*], (party hereto), *Hath* (*f*) granted, bargained, sold, and demised, and by these presents *Doth* grant, &c., unto the said [*purchaser*], his executors, administrators, and assigns, ALL THOSE several ma-

Testatum.

For a pecuniary consideration, vendor demises to purchaser.

Parcels.

Variations, where the conveyance is of the whole estate for life.

(*d*) If the conveyance is to be of the whole life estate, omit the five words preceding this reference, namely—" one hundred years, determinable with,"—and vary the precedent generally in the text according to the subsequent notes.

(*e*) " during the life of the said [*vendor*], and of settling," &c.

(*f*) " granted, bargained, sold, and released, and by these presents *Doth* &c., unto the said [*purchaser*], his executors, administrators, and assigns, (in the actual possession, &c.), *(in the usual manner)*, ALL THOSE," &c.

BY TENANT FOR LIFE, FOR A TERM DETERMINABLE ON HIS DECEASE.

nors or reputed manors of *(describe parcels, with general words)*, And all and every the yearly and other rents and profits of all and singular the said premises (*g*), TO HAVE AND TO HOLD the said several manors, &c., and all and singular other the premises hereby demised, or intended so to be, with their rights, royalties, members, and appurtenances, unto the said [*purchaser*], his executors, administrators, and assigns (*h*), from the day of the date of these presents, during the full term of one hundred years thence next ensuing, (if the said [*vendor*], (party hereto), shall so long live), to his and their own use and benefit, without impeachment of or for any manner of waste, and with such power of felling and cutting down all and every the woods, timber and other trees standing, growing, and being, and which, during the said (*i*) term, determinable as aforesaid, shall stand, grow, and be in or upon the said premises, or any part thereof, as is now vested in him the said [*vendor*], (party hereto), under and by virtue of the said hereinbefore in part recited indenture of release or settlement, or otherwise howsoever, or which he might have exercised or done in case these presents had not been made; *But so always and upon this express condition* and agreement, that he the said [*purchaser*], his executors, administrators, or assigns, shall not nor will, at any time or times hereafter, fell, cut down, stub up, lop or top, or permit to be felled, cut down, stubbed up, lopped or topped, any timber or other tree or trees likely to become timber, standing, growing, or being, or which, during the said (*k*) term, determinable as aforesaid, shall stand, grow, or be in or upon the said premises, (other than and except such as are now marked and numbered, and the particulars whereof are indorsed on these presents, and subscribed by the said [*vendor*] and [*purchaser*]; and other than and except such

Habendum to purchaser for one hundred years, if vendor so long live.

(*g*) "and all the estate, right, title, interest, property, claim, and demand whatsoever, both at law and in equity, of the said [*vendor*] in and to the said hereditaments."

Variations, where the conveyance is of the whole estate for life.

(*h*) "henceforth during the term of the natural life of the said [*vendor*], to his and their own use," &c.

(*i*) "estate for life hereby released."

(*k*) "estate for life hereby released, shall stand," &c.

BY TENANT FOR LIFE, FOR A TERM DETERMINABLE ON HIS DECEASE.

young shoots as may reasonably be drawn or removed for the general benefit of the timber, or as underwood; and other than and except such timber as shall be reasonably wanted for repairs); or do or commit, or permit or suffer to be done or committed, any unreasonable or wilful waste, spoil, or destruction, in or upon the said hereditaments and premises, or any part thereof; Together with the full benefit of all other powers, rights, and authorities reserved to or vested in him the said [*vendor*], in, over, or upon the said hereby intended to be demised (*l*) premises, in and by the said indenture of release and settlement, (except the several powers of jointuring and making provision for younger children, therein mentioned), so far as he the said [*vendor*] is lawfully authorized and empowered to transfer and delegate the same.

Covenants by vendor,

And the said [*vendor*], (party hereto), for himself, his heirs, executors, administrators, and assigns, doth covenant with the said [*purchaser*], his executors, administrators, and assigns, by these presents, in manner following, that is to say,

—that, notwithstanding, &c., he stands seised,

that, notwithstanding any act, deed, matter, or thing whatsoever, by him the said [*vendor*], (party hereto), or the said [*father*], his late father, deceased, or [*former owner*], late of ——, also deceased, (the previous owner of the said hereditaments), done, executed, or suffered to the contrary, he the said [*vendor*], (party hereto), now is seised of all and singular the said manors, ——, and hereditaments hereby demised (*l*) or intended so to be, with their appurtenances, of or for a good and indefeasible estate of freehold, during the term of his natural life, in possession, without impeachment of or for any manner of waste; And with full power to commit waste, and without any condition, reservation, power of revocation, or other restriction, matter, cause, or thing whatsoever, to alter, determine, impeach, make void, or incumber the same; *And also*, that, notwithstanding any such act, deed, matter, or thing as aforesaid, he the said [*vendor*], (party hereto), now hath in himself full power and authority to grant and demise (*m*) the several manors, ——, and hereditaments, and all other the premises hereinbefore described, unto the said [*purchaser*], his executors, admi-

—and has good right to grant.

Variations, where the conveyance is of the whole estate for life.

(*l*) "released."

(*m*) "release."

nistrators, and assigns (*n*), for the said term of one hundred years, determinable as aforesaid, according to the true intent and meaning of these presents; *And also*, that, notwithstanding any such act, deed, matter, or thing as aforesaid, he the said [*purchaser*], his executors, administrators, and assigns, shall, and lawfully may, at all times henceforth during the (*o*) said term of one hundred years, determinable as aforesaid, peaceably and quietly enter into and hold and enjoy the said hereditaments and premises, and receive the rents and profits thereof, for his and their own use; *And also*, to fell, cut down, and sell and dispose of the said woods, timber and other trees, and exercise the aforesaid rights and authorities, (except as aforesaid), without any interruption of the said [*vendor*], (party hereto), or his assigns, or any other person or persons claiming by, from, or under the said [*father*], his late father, deceased, or the said [*former owner*], also deceased, or either of them; *And that* free and clear, and freely and clearly discharged, and by the said [*vendor*], (party hereto), his heirs, executors, or administrators, effectually kept indemnified from and against all estates, titles, charges, and incumbrances whatsoever, created or occasioned by him the said [*vendor*], (party hereto), or by the said [*father*], his late father, deceased, or the said [*former owner*], also deceased, or any or either of them, or by any other person or persons claiming by, from, or under him, them, or either of them, or by or through his, their, or either of their acts, means, consent, privity, or procurement, (other than and except such leases as have been made in pursuance of the said power, and are now subsisting (*p*)); *And moreover*, that he the said [*vendor*], (party hereto), and every other person lawfully claiming by, from, or under him, or by, from, or under the said [*father*], his late father, deceased, or the said [*former owner*], also deceased, or any or either of them, shall and will, from time to time and at all times during the (*q*) said term of one hun-

BY TENANT FOR LIFE, FOR A TERM DETERMINABLE ON HIS DECEASE.

For peaceable enjoyment.

Free from incumbrances.

And for further assurance.

(*n*) "during the natural life of the said [*vendor*], according,"

(*o*) "natural life of the said [*vendor*], peaceably," &c.

(*p*) The rents reserved by these leases would pass by the present deed. The particulars of them should be obtained, unless the counterparts are delivered.

(*q*) "natural life of the said [*vendor*], at the request" &c.

Variations, where the conveyance is of the whole estate for life.

BY TENANT FOR LIFE, FOR A TERM DETERMINABLE ON HIS DECEASE.

dred years, determinable as aforesaid, at the request and at the costs of the said [*purchaser*], his executors, administrators, and assigns, make, do, and execute all and every such further acts, deeds, and assurances for the more effectually demising (*r*) and assuring the said manors, ——, and hereditaments, with their appurtenances, (except as aforesaid), unto the said [*purchaser*], his executors, administrators, and assigns, during all the residue which shall be then unexpired of the (*s*) said term of one hundred years, determinable as aforesaid, according to the true intent and meaning of these presents, as by the said [*purchaser*], his executors, administrators, or assigns, or his or their counsel learned in the law, shall be reasonably devised or advised and required; so as such further or other assurances contain in them no further or more extensive warranty than against the person or persons, and his, her, or their executors or administrators, who shall be required to make and execute the same; And so as such person or persons shall not be compelled or compellable, for the making or doing thereof, to go or travel above the space of five miles from his, her, or their place or respective places of abode; *And further*, that he the said [*vendor*], (party hereto), will, from time to time, and at all times hereafter during the (*t*) said term of one hundred years, determinable as aforesaid, if required, and he shall be deemed a necessary party, upon the request and at the costs of the said [*purchaser*], his executors, administrators, or assigns, depute and appoint, or join and concur with the said [*purchaser*], his executors, administrators, or assigns, in deputing and appointing, by all lawful and effectual ways and means, such person or persons as he or they shall nominate, or choose, or recommend for that purpose, to be a gamekeeper or gamekeepers (*u*), bailiff or bailiffs, steward or

And to join in appointing gamekeepers, &c.

Variations, where the conveyance is of the whole estate for life.

(*r*) "releasing."

(*s*) "estate for life of the said [*vendor*], hereby intended to be released, according" &c.

(*t*) "term of his natural life, if required," &c.

1 & 2 W. 4, c. 32, relating to game.

(*u*) As to appointments of this nature, *vide ante*, Vol. 2, p. 372. By the late act of 1 & 2 W. 4, c. 32, lords of manors are entitled to the game on the waste, and are empowered to appoint gamekeepers for preserving

BY TENANT FOR LIFE, FOR A TERM DETERMINABLE ON HIS DECEASE.

stewards, or other officer or officers of or for all or any of the said manors and premises hereby demised (*v*); And also, at the will and pleasure of the said [*purchaser*], his executors, administrators, or assigns, remove or displace, or join in removing or displacing, any such gamekeeper, steward, bailiff, or other officer; and in like manner as aforesaid to substitute and appoint any other person or persons (to be also nominated, chosen, or recommended for that purpose by the said [*purchaser*], his executors, administrators, or assigns), in the room of the officer so removed or displaced; And so from time to time, when and as often as he the said [*purchaser*], his executors, administrators, or assigns shall think fit, during the continuance of his estate and interest in the premises as aforesaid, by virtue of these presents; *And likewise,* that he the said [*vendor*], (party hereto), shall and will, during the said term of (*w*) one hundred years, determinable as aforesaid, at the like costs of the said [*purchaser*], his executors, administrators, or assigns, make and execute, or join and concur with the said [*purchaser*], his executors, administrators, or assigns, in making and executing all and every such lease and leases of all or any part of the said manors, ——, and hereditaments hereby demised (*x*), or intended so to be, with their appurtenances, as he the said [*purchaser*], his executors, administrators, or assigns, shall reasonably require; so as all such leases be made conformable to the said recited power vested in the said [*vendor*], (party hereto), in and by the said recited indenture of settlement, and to all and every the conditions and restrictions therein contained in that behalf; And shall and will, from time to time, deliver, or cause to be delivered, counterparts of all such leases, executed by the respective tenants or lessees therein named, unto the said [*purchaser*], his executors, administrators, or assigns; *And*

And to concur in making leases.

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and killing game for the lord's use, and also to appoint deputation gamekeepers to kill game for the use of the persons so deputed, or of any other persons specified in the appointment. The appointments are to be under hand and seal, and registered with the clerk of the peace. As to Wales, *vide* sect. 15.

(*v*) "released."

(*w*) "his natural life, at the like costs," &c.

(*x*) "released."

Variations, where the conveyance is of the whole estate for life.

BY TENANT FOR LIFE, FOR A TERM DETERMINABLE ON HIS DECEASE.

also, that it shall be lawful for the said [*purchaser*], his executors, administrators, or assigns, from time to time during the continuance of every such lease, (if the said (*y*) determinable term hereby granted shall so long endure), to receive and take to his and their own use all and every the rent and rents reserved upon such lease or leases respectively; *And also*, to make use of the name of the said [*vendor*] in the prosecution of any action or actions, suit or suits at law and in equity, in levying any distress or distresses, or in making any avowry or avowries, cognizance or cognizances, or in using any other lawful means for the purpose of enforcing payment of the rent or rents, and the performance of any of the covenants to be thereby and therein respectively reserved and contained, as effectually, to all intents and purposes, as the said [*vendor*], (party hereto), might or could have done if these presents had not been made. *(Also covenant by vendor to produce settlement)* (*z*).

Covenant by purchaser to indemnify vendor,

AND the said [*purchaser*], for himself, his heirs, executors, administrators, and assigns, doth hereby covenant with the said [*vendor*], (party hereto), his executors, administrators, and assigns, that he the said [*purchaser*], his heirs, executors, administrators, and assigns, shall and will, at all times hereafter, keep harmless and indemnified the said [*vendor*], (party hereto), his heirs, executors, administrators, and assigns, and his and their goods, chattels, estates, and effects, of, from, and against all costs, damages, charges, and expenses which he or they shall pay or sustain by reason of the said [*vendor*], (party hereto), deputing and appointing, or joining or concurring in deputing and appointing, any gamekeeper, bailiffs, stewards, or other officers as aforesaid, or in removing or displacing them or any of them, and appointing others or other in their or his stead respectively, or making and executing such leases as last mentioned, and delivering or causing to be delivered counterparts

—By reason of his joining in the appointment of gamekeepers, or in making leases, &c.

Variations, where the conveyance is of the whole estate for life.

(*y*) "*vendor* shall so long live, to receive" &c.

(*z*) If the settlement is left in the possession of the vendor, a memorandum of the present deed ought to be indorsed upon it. *Vide* an observation, *ante*, p. 183. If any leases have been granted by the vendor, the counterparts of which are retained by him, the covenant for production should extend to them.

thereof, executed as aforesaid, to the said [*purchaser*], his executors, administrators, or assigns, or of the liberty hereby given for the said [*purchaser*], his executors, administrators, or assigns, to receive the rents to be reserved by such leases respectively; And to use the name of the said [*vendor*], (party hereto), in any other way, for compelling payment of the rents and performance of the covenants to be reserved and contained in such last-mentioned leases; And also, that he the said [*purchaser*], his executors, administrators, and assigns shall not nor will, at any time or times during the (*aa*) said term of one hundred years, determinable as aforesaid, fell, cut down, stub up, lop or top, or permit to be felled, cut down, stubbed up, lopped or topped, any timber or other tree or trees likely to become timber, standing, growing, or being, or which, during the same term (*bb*), shall stand, grow, or be in or upon the said premises, other than and except such as are now marked and numbered, and the particulars whereof are specified in the memorandum indorsed on these presents as aforesaid, and other than and except such lairs and young shoots as may reasonably be removed for the general benefit of the timber, or as underwood, and other than and except such timber as shall reasonably be wanted for repairs, or make, do, or commit, or cause to be made, done, or committed, any unreasonable or wilful waste, damage, spoil, or destruction in, upon, or to the said hereditaments and premises, other than and except such as may be made by felling down and renewing the woods, timber, and other trees hereby bargained and sold, according to the true intent and meaning of these presents; And whereas in the last spring the said [*vendor*], (party hereto), did cause to be fallen, in and upon the said lands and hereditaments intended to be hereby demised (*cc*), a considerable quantity of timber then growing thereon, part whereof is now lying on the ground, and is intended to be removed as soon as the season will permit; Now the said [*purchaser*] doth hereby, for himself, his executors, administrators, and assigns, covenant with the said [*vendor*],

BY TENANT FOR LIFE, FOR A TERM DETERMINABLE ON HIS DECEASE.

Not to cut any timber not specified in the indorsed memorandum, except for repairs;

—or commit waste.

Recital of vendor having caused certain timber to be fallen, and

Covenant by purchaser to permit him to remove it.

(*aa*) " estate for life hereby released, fall," &c.
(*bb*) " estate shall," &c.
(*cc*) " released,"

Variations, where the conveyance is of the whole estate for life.

BY TENANT FOR LIFE, FOR A TERM DETERMINABLE ON HIS DECEASE.

(party hereto), his executors, administrators, and assigns, that it shall be lawful for the said [*vendor*], (party hereto), his executors, administrators, or assigns, at his and their free will and pleasure, henceforth from time to time, at seasonable times, to enter and come into and upon the said lands and hereditaments intended to be hereby demised (*dd*), or any part thereof, with horses, carts, and carriages, to remove and carry away the said timber now lying thereon as aforesaid, he the said [*vendor*], (party hereto), his executors, administrators, or assigns, doing as little damage thereby as may be, and using all proper and reasonable dispatch in removing the same. IN WITNESS, &c.

(*dd*) "released."

OF LEASEHOLDS DETERMINABLE WITH LIVES, OR FOR LIVES ABSOLUTELY, BY LEGATEES, &c.

ASSIGNMENT *of* LEASEHOLD *Dwelling-house and Garden, for a Term determinable with Lives, by three* SPECIFIC LEGATEES, *with the* CONCURRENCE *of the* EXECUTORS. *(Variation where the* VENDORS *are* RESIDUARY LEGATEES; *or where the Sale is by the* NEXT *of* KIN *on an Intestacy, with the* CONCURRENCE *of the* ADMINISTRATORS*). Also, where the* LEASE *is for* LIVES *absolutely.*

Parties.

THIS INDENTURE, made the —— day of ——, in the year of the Christian æra, 18—, BETWEEN [*three vendors*], of &c., of the first part; [*executors*] (*a*), of &c., of the se-

(*a*) Or "[*administrators*]," as the case may be, unless, as the fact commonly is, the administrators are also next of kin, and then they will be included in the parties of the first part.

As to the obtaining of letters of administration.

Under an intestacy, if the next of kin are numerous, it is usual for some only of them to take out administration, the practice of the Ecclesiastical, or rather of the Prerogative Court, being to grant it to any one or more of several persons who are *equally* entitled, without requiring any act of renunciation on the part of the others, though of course, where the applicant for a grant is not *one* of the next of kin, it is necessary for them (the next of kin) to relinquish their prior title by an act of this nature.

cond part; and [*purchaser*], of &c., of the third part: WHEREAS, by indenture bearing date on or about the —— day of ——, 18—, and made or expressed to be made between [*lessor*], of &c., of the one part; and [*lessee*], of &c., of the other part; For the considerations therein mentioned, the said [*lessor*] did demise and lease unto the said [*lessee*], *All that* dwelling-house and garden situate

OF LEASEHOLDS DETERMINABLE WITH LIVES, OR FOR LIVES ABSOLUTELY, BY LEGATEES, &c

Recital of lease.

The precedent in the text supposes the legal and beneficial interest to be in different persons. Where executors or administrators, being also legatees or next of kin, possess in these several characters the entire legal and equitable ownership, their conveyance differs but little from that of any other absolute owners, though some practitioners, in such cases, are careful to make the vendors assign in their representative character rather than as beneficial owners.

Observations upon the precedent in the text.

Where an executor or administrator sells leaseholds by virtue of his general power of disposition over the assets of the testator or intestate, the deed of assignment is of the simplest character. It merely recites the ownership of the deceased, the appointment of, and probate of the will by, the executors, or (in the case of an intestacy) the grant of letters of administration; and then the executor or administrator assigns, and covenants that he has not incumbered. It is unnecessary to state, that the executor or administrator sells for the purpose of raising money to pay debts, as this is the presumed object of the sale, especially where it embraces property which has been specifically bequeathed; and in such cases it is certainly usual, and perhaps better, to recite the fact of the sale being made to enable the executor to pay the debts of the testator. It is always sufficient, however, that the contrary does not appear, and then the purchaser's title will be good against the specific legatee, unless the executor has assented to the bequest. The subject of sales by executors and legatees is very fully discussed *ante*, Vol. 6, p. 292.

As to sales by executors or administrators.

It may be as well just to notice, that *one* of several executors is competent to assent to a legacy, *vide ante*, Vol. 2, p. 641, or to make to a purchaser an effectual assignment of a leasehold estate; but it is usual to require the concurrence of all, in order to guard against the possible event of a sale having been made by any other executor, who of course has, and may have exercised the same power of alienation over the term which is possessed by his coadjutor or coadjutors, and that the purchaser may have the benefit of a covenant from *all* the executors that they have not incumbered. This consideration, of course, has more weight where the testator was beneficial owner, than where he had only a dry legal estate; in the latter case, an assignment from one of several executors is sometimes taken for the sake of convenience.

One of several executors competent to sell leaseholds.

OF LEASEHOLDS DETERMINABLE WITH LIVES, OR FOR LIVES ABSOLUTELY, BY LEGATEES, &c.

and being on the —— side of —— street, at ——, in the county of ——, and then late in the occupation of ——, with the appurtenances, *To hold* to the said [*lessee*], his executors, administrators, and assigns, (*b*) for the term of —— years, if [*three cestuis que vie*], or any or either of them, should so long live, Under and subject to the yearly rent, covenants, conditions, and agreements therein contained on the part of the said [*lessee*], his executors, administrators, and assigns, to be paid, observed, and performed. AND WHEREAS the said [*lessee*] died on or about the —— day of ——, 18—, having first duly made and published his last will and testament in writing, bearing date on or about the —— day of ——, 18— (*c*), whereby he gave and bequeath-

Death and will of lessee.

(*b*) If the lease is for lives, say—

Variations.

"during the natural lives of [*three cestuis que vie*], and the lives and life of the survivors and survivor of them, Under and subject" &c.

In this case the estate must have been created by some assurance adapted to *freehold* estates.

(*c*) If the lease is held for lives, and it is specifically devised, say—

"duly executed and attested for the devise of freehold estates."

As to estates *pur auter vie*, forming part of the residuary property.

If the property is not specifically devised, but passes to the vendors under the general residuary clause, the manner of the execution of the will need not be noticed: for it was decided in the case of *Ripley* v. *Waterworth*, 7 Ves. 425, that, though the statute of frauds required an attestation by three witnesses to a will disposing of estates *pur auter vie*, yet an executor taking property of this kind as special occupant, was a trustee for the residuary legatees, though the will under which they claimed was not attested by three witnesses. Even where leaseholds for lives, devolving to the executors as special occupants, are specifically devised, as they are primarily liable in the hands of the executors to the payment of the testator's debts, their concurrence should be required in like manner as where the lease is for a term.

It will be obvious that the preceding observations apply only where the estate *pur auter vie* was limited to, or vested for want of contrary words of limitation in, the *personal* representatives of the testator; for if it were limited to his *heirs*, the executor or administrator would take no interest whatever in it. A will attested by three witnesses would be requisite to prevent its devolution upon the heir as special occupant, though the property would be liable in his hands as assets by descent.

ed unto and equally between the said [*vendors*], their executors, administrators, and assigns, for their own respective use and benefit, the said dwelling-house and garden, with the appurtenances, for all the term, estate, and interest, which he should have to come therein at the time of his decease (*d*). *(Recite appointment of executors, and probate of the will by them).* And whereas the said [*executors*] have assent-

OF LEASEHOLDS DETERMINABLE WITH LIVES, OR FOR LIVES ABSOLUTELY, BY LEGATEES, &c.

(*d*) If the sale is by residuary legatees—

"And thereby, after bequeathing several general and specific legacies, not including the said leasehold premises, gave and bequeathed all the residue and remainder of his personal estate and effects unto and equally between the said [*vendors*], their executors, administrators, and assigns, for their own respective use and benefit."

Variation, where vendors are residuary legatees.

If by next of kin and administrators on an intestacy—

"And whereas the said [*lessee*] died intestate on or about the —— day of ——, 18—, and letters of administration of all and singular the goods, chattels, and credits of the said [*lessee*] were, on the —— day of ——, 18—, granted to the said [*administrators*] by the Prerogative Court of the Archbishop of Canterbury; And whereas the said [*vendors*] were the children [*or* brothers and sisters, *or* first cousins, *or otherwise as the case may be*], and only next of kin of the said [*lessee*] at the time of his decease, and as such are beneficially entitled to the said dwelling-house and garden, with the appurtenances, for the residue of the said term, determinable as aforesaid, [*or* of the lives of the said [*cestuis que vie*], and the lives and life of the survivors and survivor of them, *as the case may be*]."

Where lessee died intestate.

—That vendors are next of kin.

If it be deemed advisable to state the periods of birth and places of baptism of the vendors, &c., in order to facilitate the future proof of these facts, proceed thus—

"And whereas the said [*first vendor*] was baptized at the parish church of ——, on the —— day of ——, the said [*second vendor*], at the same place, on the —— day of ——, and the said [*third vendor*], at the same place, on the —— day of ——; and their parents, [A. B.] and [C. D.], were respectively married at the parish church of ——, on the —— day of ——."

Places and times of baptism, &c., of vendors.

This would be sufficient if the next of kin were the children of the in-

OF LEASEHOLDS DETERMINABLE WITH LIVES, OR FOR LIVES ABSOLUTELY, BY LEGATEES, &c.

Contract for purchase.

ed to the bequest of the said dwelling-house and garden, with the appurtenances, so made by the said [*testator*] to the said [*vendors*] as aforesaid, as they the said [*executors*] do hereby acknowledge and declare, (testified by their severally executing these presents (*e*)); And whereas the said [*purchaser*] hath contracted and agreed with the said [*vendors*] for the absolute purchase of the said dwelling-house and garden, with the appurtenances, demised by the said indenture of lease, for the residue of the (*f*) said term of —— years determinable as aforesaid, at or for the price or sum of £——; And at the request of the said [*purchaser*], they the said [*executors* (*g*)] have agreed to join in the assurance hereby made of the said dwelling-house and garden, with the appurtenances.

Testatum.

NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of £—— of lawful money of Great Britain and Ireland to the said [*vendors*] paid by the said [*purchaser*] at or before the execution of these presents, the receipt of which said sum of £—— they the said [*vendors*] respectively do hereby acknowledge, and from the same sum do acquit, release, and discharge the said [*purchaser*], his executors, administrators, and assigns; and also in consideration of the sum of 10*s.* of lawful money aforesaid to each of them the said [*executors* (*g*)] at the same time paid by the said [*purchaser*], the receipts whereof respectively are hereby acknow-

In consideration of purchase-money, vendors, and, for nominal consideration, executors assign.

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testate; if they were more remote relations, the proof of their relationship would embrace a wider range of facts, and which might be shewn by an indorsed pedigree. This is, also, a convenient mode where a conveyance is made by an heir, who is a remote collateral relation of the person last seised.

(*e*) As there is some doubt whether the assent of an executor will vest in a residuary or general legatee leaseholds forming part of the residuary or general personal estate, it is proper, where the sale is made by residuary or general legatees, to omit this recital. Where the vendors are entitled as the next of kin of the late intestate owner, it is of course altogether inapplicable.

(*f*) If the lease is for lives, say—

Variations.

"lives of the said [*cestuis que vie*], and the lives and life of the survivors and survivor of them, at or for" &c.

(*g*) Or "[*administrators*]."

ledged, They the said [*vendors*] *Have*, and every of them *Hath* (*h*) granted, bargained, sold, and assigned over, And by these presents *Do*, and every of them *Doth* grant, &c.; And the said [*executors* (*i*)], at the request and by the direction of the said [*vendors*], testified by their severally executing these presents, *Have*, and every of them *Hath* bargained, sold, assigned, and transferred, And by these presents *Do*, and every of them *Doth* bargain, &c., unto the said [*purchaser*], his executors, administrators, and assigns, ALL THAT the said dwelling-house and garden, and all and singular other the premises mentioned in or demised by the said in part recited indenture of lease, or intended so to be, with the appurtenances thereto belonging or in anywise appertaining, Together with the said indenture of lease; *And* all the estate, right, title, interest, term of years yet to come and unexpired, property, claim, and demand whatsoever, both at law and in equity, of every of them the said [*vendors*] and [*executors*] (*k*), in and to the said dwelling-house and garden hereby assigned, or intended so to be, with the appurtenances; TO HAVE AND TO HOLD the said dwelling-house and garden, and all and singular other the premises hereby assigned (*l*), or intended so to be, with the appurtenances, unto the said [*purchaser*], his executors, administrators, and assigns, henceforth (*m*) during all the re-

OF LEASEHOLDS DETERMINABLE WITH LIVES, OR FOR LIVES ABSOLUTELY, BY LEGATEES, &c.

And all the estate, &c.

(*h*) If the lease is for lives, say—

"granted, bargained, sold, and released, and by these presents *Do* &c., And the said [*executors*], (or [*administrators*]) *Have* bargained, sold, and released, And by these presents *Do* bargain &c., in the actual possession &c., *(Lease for a year by vendors and executors, or administrators).*"

Variations.

(*i*) Or "[*administrators*]." But, if the administrators are some of the next of kin, no separate act of assurance by them in their representative character will be necessary.

(*k*) Or "[*administrators*]."

(*l*) If the lease is for lives, the word "assigned" will be changed to "released," throughout the precedent.

(*m*) If the lease is for lives, say—

"during the natural lives of the said [*cestuis que vie*], and the lives and life of the survivors and survivor of them, and

OF LEASEHOLDS DETERMINABLE WITH LIVES, OR FOR LIVES ABSOLUTELY, BY LEGATEES, &c.

sidue now unexpired of the said term of —— years, determinable as aforesaid, granted by the said indenture of lease, and for all other the estate, term, and interest of the said [*vendors*] and [*executors* (*n*)] respectively, under or by virtue of the same indenture, Subject, nevertheless, to the rents, covenants, conditions, and agreements in the said indenture of lease reserved and contained, and which, by the lessee, his executors, administrators, and assigns, are and ought to be henceforth paid, observed, and performed. (*Covenant by executors* (*n*) *that they have not incumbered* (*o*).) AND the said [*three vendors*] do hereby for themselves respectively, and their respective heirs, executors, and administrators, each of them so far as relates to and concerns one undivided third part of the said dwelling-house and garden hereby assigned, or intended so to be, and as to and concerning only the acts, deeds, title, and defaults of himself and the said [*testator* (*p*)] deceased, relating thereto, do severally covenant and agree with the said [*purchaser*], his executors, administrators, and assigns, That, notwithstanding any act, deed, matter, or thing, made, done, executed, or suffered to the contrary by them the said [*vendors*], or by the said [*testator* (*p*)], deceased, the said indenture of lease now is a good and effectual lease for all the premises therein mentioned, for and during (*q*) the residue now unexpired of the said term, determinable as aforesaid, thereby expressed to be granted,

Covenant by vendors.

—That, notwithstanding &c., lease is valid.

Variations.

for all other the estate and interest granted by the hereinbefore recited indenture of lease, subject" &c.

(*n*) Or "[*administrators*]."

(*o*) Where the executors or administrators, in whom the legal estate of the entirety is vested, are beneficially entitled to an aliquot share, and covenant for the title in regard to that share, they ought also to enter into the usual trustees' covenant that they have not incumbered the *entirety*."

(*p*) Or "[*intestate*]."

(*q*) If the lease is for lives, say—

"the natural lives of the said [*cestuis que vie*], and the lives and life of the survivors and survivor of them, and is not surrendered" &c.

and is not surrendered, forfeited, or become void or voidable, and that none of the covenants therein contained are broken or unperformed in any manner howsoever; And that, notwithstanding any such act, deed, matter, or thing as aforesaid, they the said [*vendors*] and [*executors* (*r*)] now have, or some or one of them have or hath in themselves or himself, full power and absolute authority to sell and assign the said dwelling-house and garden hereby assigned, or intended so to be, with the appurtenances, and the said indenture of lease, to the said [*purchaser*], his executors, administrators, and assigns, during the (*s*) residue of the said term of —— years, determinable as aforesaid, in manner aforesaid, and according to the true intent and meaning of these presents; And that he the said [*purchaser*], his executors, administrators, and assigns, shall or lawfully may from time to time during the (*t*) residue now unexpired of the said term of —— years, determinable as aforesaid, granted by the said recited indenture of lease, peaceably and quietly hold and enjoy the said dwelling-house and garden hereby assigned, or intended so to be, and receive and take to his and their own use, all the rents, issues, and profits thereof, without any lawful eviction, disturbance, or interruption of or by them the said [*vendors*], or any or either of them, or their or any or either of their executors or administrators, or any other person or persons whomsoever lawfully claiming by, from, through, under, or in trust for them, or any or either of them, or by, from, through, under, or in trust for the said [*testator* (*u*)] deceased, or by his or their, or any or either of their acts, means, neglect, or procurement; *And*

OF LEASEHOLDS DETERMINABLE WITH LIVES, OR FOR LIVES ABSOLUTELY, BY LEGATEES, &c.

For peaceable enjoyment.

Free from incumbrances.

(*r*) Or "[*administrators*]."

Variations.

(*s*) If the lease is for lives, say—

"natural lives of the said [*cestuis que vie*], and the lives and life of the survivors and survivor of them, in manner" &c.

(*t*) "natural lives of the said [*cestuis que vie*], and the lives and life of the survivors and survivor of them, peaceably" &c.

(*u*) Or "[*intestate*]."

OF LEASEHOLDS DETERMINABLE WITH LIVES, OR FOR LIVES ABSOLUTELY, BY LEGATEES, &c.

free and clear, and freely and clearly acquitted and discharged, or by them the said [*vendors*], their heirs, executors, or administrators, well and effectually kept indemnified of, from, and against all and all manner of former gifts, grants, bargains, sales, assignments, surrenders, forfeitures, rents, arrears of rent, charges, or incumbrances whatsoever, made, occasioned, or suffered by him, her, them, or the said [*testator* (*v*)] deceased, or by his, their, or any of their acts, means, neglect, or procurement; *And lastly*, that they the said [*vendors*] respectively, and their respective executors or administrators, and every other person lawfully claiming any estate, right, title, or interest in, to, or out of the said dwelling-house and garden hereby assigned, or intended so to be, by, from, or under them respectively, or by, from, or under the said [*testator* (*v*)] deceased, shall and will, from time to time, and at all times hereafter, upon the request and at the costs of the said [*purchaser*], his executors, administrators, or assigns, make, do, and execute, or cause to be made, done, and executed, all and every such further acts, deeds, assignments, and assurances in the law whatsoever, for the more effectually assigning and confirming the said dwelling-house and garden hereby assigned, or intended so to be, with the appurtenances, unto the said [*purchaser*], his executors, administrators, and assigns, during the residue which shall be then unexpired of the (*w*) said term of —— years, determinable as aforesaid, *As* by the said [*purchaser*], his executors, administrators, or assigns, or his or their or any of their counsel in the law shall be reasonably advised or devised and required, so that &c., (*ut ante*, p. 47); *And the* said [*purchaser*] doth hereby for himself, his heirs, executors, administrators, and assigns, covenant with the said [*vendors*] and every of them, their and every of their executors and administrators, that he the said [*purchaser*], his executors, administrators, or assigns, will, from time to

And for further assurance.

Covenant by purchaser to pay rent and perform covenants of lease.

Variations.

(*v*) Or "[*intestate*]."

(*w*) If the lease is for lives, say—

"natural lives of the said [*cestuis que vie*], and the lives and life of the survivors or survivor of them, *As* by" &c.

time henceforth pay the rent and observe and perform the covenants and agreements on the part of the lessee, his executors, administrators, and assigns, in the said recited indenture of lease reserved and contained, and will at all times hereafter effectually keep indemnified the said [*vendors*] respectively, and their respective heirs, executors, and administrators, and also the heirs, executors, or administrators for the time being of the said [*testator* (*x*)] deceased, from and against all actions, suits, costs, charges, expenses, claims, and demands whatsoever, which shall or may be prosecuted or made against or upon or incurred by them or any of them, by reason or on account of the non-payment or non-performance from henceforth of the same rent, covenants, and agreements respectively, or in relation thereunto. IN WITNESS, &c.

OF LEASEHOLDS DETERMINABLE WITH LIVES, OR FOR LIVES ABSOLUTELY, BY LEGATEES, &c.

(*x*) Or "[*intestate*]." Variation.

DEED *of* ENFRANCHISEMENT *of* COPYHOLDS *by the Lord of a Manor to his Tenant* (*a*).

ENFRANCHISEMENT OF COPYHOLDS.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the one part; and [*purchaser*], Parties.

(*a*) A deed of enfranchisement either assumes the form of a conveyance from the lord to the copyholder of the land which is the subject of it, or merely that of a release of the seigniorial right. The former is more commonly adopted. The lord can only enfranchise to the extent of his estate; and, therefore, it is incumbent on the copyholder, who gives a valuable consideration for the enfranchisement, to ascertain the lord's competency, with respect to estate, to make it. But where the copyholder has a limited interest only, the lord's grant to him enures to the benefit of the persons entitled in remainder or reversion. *Wynne* v. *Cookes*, 1 Brown's Cha. Cas. 515. See Scriven on Copyholds, 408. As to the enfranchisement of copyholds.

It seems to be the better opinion, that a copyholder accepting enfranchisement from the lord, brings upon his estate any incumbrances af-

ENFRANCHISEMENT OF COPYHOLDS.

Recital of seisin.

of &c., of the other part: WHEREAS the said [*vendor*] is seised to him and his heirs, in fee-simple in possession, free from all incumbrances, of the manor of ——, in the county of ——; and the said [*purchaser*] is seised to him and his heirs, at the will of the lord, according to the custom of the said manor, of all and singular the copyhold messuage or tenement, pieces or parcels of land and hereditaments hereinafter described (*b*), as by the court rolls of the said manor appears.

Contract for enfranchisement.

AND WHEREAS the said [*vendor*] hath contracted with the said [*purchaser*], that, for the consideration hereinafter mentioned, the said messuage or tenement, lands and hereditaments, shall be enfranchised, and from henceforth for ever hereafter absolutely freed and discharged from all and all manner of fines, heriots, rents, suit, services, and customs whatsoever, and be and continue as freehold.

Testatum.

NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and also in consideration of the sum of £——, of lawful money of Great Britain and Ireland, to him the said [*vendor*] at or before the sealing and delivery of these presents in hand well and truly paid by the said [*purchaser*], the receipt of which said sum he the said [*vendor*] doth hereby acknowledge, and of and from the same doth acquit and discharge the said [*purchaser*], his heirs, executors, and administrators for ever by these presents; He the said [*vendor*] *Hath* granted, bargained, sold, enfranchised, released, and quitclaimed, and by these presents *Doth* grant, &c. unto the

In consideration of a sum of money, lord grants &c. to copyholder.

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fecting the manor. On this point a learned writer has observed, "a contrary doctrine has been advanced; and there is, it is believed, a decision to that effect, though frequent research has not discovered the case: but the principle on which this doctrine is maintained is not easily discovered; for, when the copyhold estate ceases, the estate under the freehold tenure must take effect in possession; and conveyancers have uniformly acted on such acceleration, and often guard against it by creating a term of years out of the copyhold tenure, prior to the enfranchisement, that the title to the possession may depend on that tenure." 1 Prest. Abs. 302.

(*b*) It is better to avoid incumbering a deed of this kind with unnecessary statements of title, as it increases the expense of enrolment.

said [*purchaser*], his heirs and assigns, ALL THAT *(describe parcels)*; And also all ways, &c.; And the reversion, &c.; And all the estate, &c.; TO HAVE AND TO HOLD the said messuage or tenement, pieces or parcels of land, hereditaments, and all and singular other the premises hereby granted and enfranchised, or expressed or intended so to be, with their appurtenances, unto the said [*purchaser*], his heirs and assigns, TO THE USE of him the said [*purchaser*], his heirs and assigns, for ever, To the end and intent that the copyhold tenure of the said messuage or tenement, lands, hereditaments, and premises may become and be extinguished, and the same may for evermore be held and enjoyed freely, clearly, and absolutely enfranchised, exonerated, acquitted, and discharged by these presents, of and from all and all manner of yearly and other payments, rents, quit-rents, chief rents, customary or copyhold rents, fines, heriots, fealty, suit of court, and all other usual or customary or copyhold payments, duties, services, or customs whatsoever, which, according to the custom of the said manor of ——, the said messuage or tenement, lands, hereditaments, and premises, or any of them, are or is, or have or hath been, or ought otherwise to be subject or liable to be charged with, or which otherwise ought to be paid, done, or performed, for or in respect of the said messuage or tenement, lands, hereditaments, and premises, or any of them, or any part thereof, as copyhold, holden of or parcel of the said manor; *Provided always* (*c*), and it is hereby declared and agreed, that nothing herein contained shall enfranchise, acquit, or discharge any tenements or hereditaments held by the said [*purchaser*] of the said [*vendor*], as lord of the said manor, other than and except the messuage or tenement, lands, and hereditaments hereinbefore particularly described, and hereby granted and enfranchised, or intended so to be, of and from the copyhold tenure, or from any rents, payments, heriots, suits, customs, or services incident thereto, or to be rendered or performed in respect thereof. AND THIS INDENTURE FURTHER

ENFRANCHISEMENT OF COPYHOLDS.

Habendum.

To the use of purchaser.

To the intent that lands may be enjoyed, discharged from services, &c.

Proviso that enfranchisement shall not extend to other lands.

Further *testatum.*

(*c*) Where the grantee holds other tenements, parcel of the manor, which are not intended to be enfranchised, this proviso is usually, though, it is apprehended, unnecessarily, inserted.

ENFRANCHISEMENT OF COPYHOLDS.

WITNESSETH (*d*), that, for the considerations aforesaid, and in order to preserve to the said [*purchaser*], his heirs and assigns, all such right of common in and over the wastes of the said manor of ——, as he the said [*purchaser*] hath heretofore used and enjoyed, as belonging or appurtenant to the messuage or tenement, lands, and hereditaments hereinbefore described, notwithstanding the enfranchisement of the same hereditaments, he the said [*vendor*] *Hath* granted and confirmed, and by these presents *Doth* grant and confirm unto the said [*purchaser*], his heirs and assigns, for ever, all such commonage and right or title to common, of what nature soever, in, over, or upon all or any of the wastes, commons, and commonable lands of or belonging to the said manor of ——, as he the said [*purchaser*] held and enjoyed in respect of the messuage or tenement, lands, hereditaments, and premises hereinbefore described, and hereby granted and enfranchised, or intended so to be, immediately before the execution of these presents, and the freehold and inheritance thereof, in as large, ample, and beneficial a manner, to all intents and purposes, as he hath heretofore used and exercised all or any such rights, or as he or his heirs or assigns could or might have used and exercised the same, in respect of the said messuage or tenement, lands, hereditaments, and premises, if the same had continued to be parcel of the said manor. (*Add usual vendor's covenants, that, notwithstanding &c., he hath power to grant; for quiet enjoyment* (*e*);

Grant of right of common formerly appurtenant to the estate.

Covenants.

Rights of common extinguished by enfranchisement.

(*d*) A copyholder's right of common in the wastes of the lord, within the manor, is extinguished by enfranchisement, and therefore a deed operating to enfranchise copyholds usually contains an express re-grant of the commonable right. *Fort* v. *Ward*, Moore, 667; *Worledg* v. *Kingswel*, Cro. Eliz. 794; *Crowder* v. *Oldfield*, Salk. 170, 366; *Barwick* v. *Matthews*, 5 Taunt. 375. It seems that a grant, in general terms, of all commons belonging to an estate would not operate as a new grant of the common formerly, but not then, appurtenant to it; *Fort* v. *Ward*, Moore, 667; *contra*, where the grant is of all commons belonging to the estate, and *theretofore usually enjoyed therewith*. *Worledg* v. *Kingswel*, Cro. Eliz. 794.

(*e*) Some gentlemen introduce special words of qualification into the covenants, to prevent their operating as a warranty of the right of common newly granted, against disturbance by any of the commoners.

free from incumbrances; and for further assurance (*f*). In WITNESS, &c.

ENFRANCHISEMENT OF COPYHOLDS.

(*f*) If the lord covenants for the production of the title-deeds of the manor, the covenant should be contained in a separate deed. In future dealings with the property, both the freehold and copyhold titles must be deduced down to the period of the conversion of the tenure. The deed of enfranchisement should be enrolled on the court rolls of the manor.

COVENANT *to surrender* COPYHOLDS *for* LIVES (*a*), *and* ASSIGNMENT *of a* LEASEHOLD *Estate, held for* 10,000 *Years, at a nominal Rent.*

COPYHOLDS FOR LIVES, AND LEASEHOLDS FOR RESIDUE OF A LONG TERM.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*vendor*], of ——, of the one part; and [*purchaser*], of ——, of the other part: WHEREAS, at a general court baron, held on the —— day of ——, in and for the manor of ——, in the county of ——, the lord of the said manor, by his steward, granted seisin, according to the custom of the said manor, unto the said [*vendor*], of ALL THAT (*describe parcels*), with the appurtenances, *To hold* the same unto the said [*vendor*], his heirs and assigns, for the term of the natural lives of [*cestuis que vie*], and of the life of the survivor of them, at the will of the lord, according to the custom of the said manor, at the rents and services therefore due and of right accustomed. AND WHEREAS, by indenture of lease, bearing date on or about the —— day of ——, in the year 1684 (*b*), and made, or expressed to be made,

Parties.

Recital of grant of copyholds for lives

—Of lease.

(*a*) As to copyholds held *pur auter vie, vide ante*, Vol. 1, p. 538, 2nd ed.

(*b*) Where an estate is held under a lease of great antiquity, a vendor, it is conceived, could only be required to shew the creation of the term, and to deduce the title for the last sixty years; and it would not be incumbent on him to trace its history, uninterruptedly, from the ori-

As to titles derived under old leases.

COPYHOLDS FOR LIVES, AND LEASEHOLDS FOR RESIDUE OF A LONG TERM.

between [*lessor*], of ——, of the one part; and [*lessee*], of ——, of the other part; for the considerations therein

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gin of the lease down to the immediate transaction; and, surely, in such a case, the requisition of the production of the lessor's title could not be supported, though it was thought, by one learned equity judge, that the antiquity of the lease made no difference in regard to this requisition. (*Vide ante*, Vol. 7, p. 370). Even the absence of the deed creating the term will not, in the opinion of some gentlemen at least, render the title unmarketable. See 1 Prest. Abs. 11.

Time does not run against an administrator, except from the grant of administration.

There is one danger attending the titles of leasehold estates, which devolve to the personal representatives of a deceased owner, from which titles of freeholds, devolving to the real representatives, are exempt, and that is, the possibility of the representation to a deceased owner having been dormant for many years, from the neglect of any person to obtain administration to his effects; for it has been decided, that time does not run against an administrator, except from the period of the grant of the letters of administration; and, therefore, in an action by an administrator upon a bill of exchange, payable to the intestate, but accepted after his death, it was held, that the statute of limitations began to run from the time of the granting of the letters of administration, and not from the maturity of the bill, there being no cause of action until there was a party capable of suing. *Murray* v. *East India Comp.* 5 B. & A. 204.

This doctrine is important as affecting leasehold titles, and, also, as affecting mortgages in general; for, supposing the owner of a leasehold estate to die intestate, and his property to fall into the possession of persons who do not obtain administration to his effects, or, in other words, who wrongfully possess themselves of the property, it might be dealt with for a very long period under the colourable title of the unlawful possessors, and, at the end of that period, if letters of administration should be procured, the administrator might, within twenty years after the grant, maintain an ejectment against the persons in possession.

So, if a mortgagee dies intestate, and any person, without title, having possessed himself of the deeds, receives the money, an administrator may, after a great lapse of time, present his claim under a newly-obtained administration, and recover. The *probability*, of course, is greatly against the existence of any unasserted claim of this kind after a great lapse of time, but it is well not to lose sight of the *possibility*. And it is to be observed, too, that it only applies where the adverse title arises after the intestate's decease; for, if the time has begun to run in his lifetime, it would not be arrested by the subsequent non-existence of any person capable of suing on account of the dormancy in the representation, according to the well-known rule in regard to the statute of fines and the statute of

mentioned, he the said [*lessor*] did grant and demise unto the said [*lessee*], his executors, administrators, and

COPYHOLDS FOR LIVES, AND LEASEHOLDS FOR RESIDUE OF A LONG TERM.

limitations. *Smith* v. *Hill*, 1 Wils. 134; *Doe* d. *Duroure* v. *Jones*, 4 D. & E. 300; *Cotterell* v. *Dutton*, 4 Taunt. 826.

Length of enjoyment necessary to create a title at law and in equity.

While adverting to the subject of conflicting titles, it may not be amiss to direct the attention of the student and practitioner to the great disparity that exists in regard to the length of enjoyment necessary to raise an unimpeachable title, where the subject is a legal estate, and where it is of a nature merely equitable. In the case of the Earl of *Cholmondeley* v. Lord *Clinton*, 2 Jac. & Walk. 1, remarkable as well for the magnitude of the property as for the importance of the principle involved in it, the House of Lords decided, that twenty years' adverse possession of an equity of redemption was a good defence to a suit for its recovery; while, on the other hand, it is well known that property is recoverable at law for a period of sixty years, by means of a writ of right, though the expensiveness and intricacy of the proceeding are such, that it is rarely resorted to, and still more rarely prosecuted with success. Hence it follows, that a man may acquire an indefeasible title to an equitable interest forty years earlier than he could have done if the subject had been of a nature to bring it within the cognizance of a Court of law. It is even possible, that he may be evicted for a legal defect of title originating long before an equitable defect, against which he is secure. Thus, suppose the case of A., owner in fee, dying intestate leaving two sons, the younger of whom wrongfully entered into possession, thereby ousting his elder brother from the inheritance. Suppose again that the younger brother made a mortgage in fee, and then died intestate, also leaving two sons, the younger of whom seized the property which by law had devolved to his brother. In this case, the last-mentioned younger son, *i. e.* the grandson, would at the expiration of twenty years have an absolute title against his brother, the subject being an equity of redemption, though, if less than sixty years had elapsed since the death of A., the grandfather, he would be liable to be evicted at the suit of his uncle as the heir of such grandfather, by means of a real action. This is an anomaly which calls for, and will probably ere long receive, legislative correction.

As to an adverse possession of an equity of redemption.

It may sometimes happen, however, that even an equity of redemption may be enjoyed by a purchaser for sixty years, and yet the enjoyment may have been ineffectual to confer an unimpeachable title; as where a deed of conveyance purporting to pass the fee, operates upon a partial or limited interest only, at the determination of which, and not before, the possession of the grantee becomes adverse to the right of the ulterior and rightful owner. An instance of this kind frequently occurring is, where the husband and wife mortgage, or sell and convey, lands which are

COPYHOLDS FOR LIVES, AND LEASEHOLDS FOR RESIDUE OF A LONG TERM.

assigns, ALL THOSE *(parcels consisting of two pieces of ground)*, *To hold* the same unto the said [*lessee*], his executors, administrators, and assigns, from the day of the date thereof, for the term of ten thousand years, without impeachment of or for any manner of waste or spoil whatsoever, at the yearly rent of one wheat corn on the feast-day of the blessed Virgin Mary yearly, (if demanded); AND WHEREAS, under and by virtue of divers mesne assignments, assurances, and other

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the inheritance of the wife, without levying a fine, in which case the possession of the grantee under the husband's conveyance (for such in effect it is, though purporting to be the conveyance of both,) is not adverse to the right of the wife or her heir, until the determination of the husband's estate, which, if he be tenant by the curtesy, (having had inheritable issue by his wife), will be at his own death, and, if not, then at the termination of the concurrent lives of him and his wife, or, in other words, at the decease of such of them as first dies.

These circumstances occurred in *Ravald* v. *Russell*, 1 Younge's Exch. Equity Cases, 9, which was as follows:—In 1757, A. and B., husband and wife, being seised in fee in her right, by lease and release conveyed the lands, by way of mortgage, to C., for 600*l*., reserving the right of redemption, on payment of the principal and interest, to the husband. The husband and wife levied a fine to the use of the mortgagee in fee. In 1765, by indenture of lease and release, reciting that C., the mortgagee, had contracted for the absolute purchase, A. and B. conveyed the lands to C., discharged from all equity of redemption; but, on this occasion, no fine was levied, though a covenant to levy one was inserted in the deed. The husband, who survived the wife, and by whom she had had issue, died in December, 1809. On the death of the wife, the fee, subject to the husband's life-interest by the curtesy, descended to their eldest son, whose assignees in bankruptcy, in November, 1829, filed a redemption bill against C., the mortgagee and purchaser, who pleaded the statute of limitations, or, rather, the rule of equity, founded on analogy to that statute; but the plea was overruled, on the ground that the statute did not begin to run against the heir of the wife until the death of the husband, whose conveyance operated to pass his life estate in the equity of redemption; and therefore, until his decease, there was no adverse possession.

This was an extreme case. The husband lived forty-four years after his conveyance of the equity of redemption, and the bill was filed nineteen years and eleven months after his death, making together a period of nearly sixty-five years, during which the purchaser had been in possession, conceiving himself to be absolute owner.

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acts in the law, and particularly by indenture bearing date on or about the —— day of ——, in the year 18—, and made between [*assignor*], of the one part, and the said [*vendor*], of the other part, the said —— and hereditaments comprised in the said hereinbefore recited indenture of lease, together with two messuages or tenements, and other buildings then lately erected and built thereon, were duly assigned to and became vested in the said [*vendor*], for the residue of the said term of ten thousand years, granted by the said indenture of lease as aforesaid; AND WHEREAS the said [*vendor*] hath contracted with the said [*purchaser*] for the absolute sale to him of the said copyhold or customary lands, tenements, and hereditaments hereinbefore described, for the respective lives of the said [*cestuis que vie*], and also of the said leasehold lands, tenements, and hereditaments, for the residue of the said term of ten thousand years therein, at and for the price or sum of £——; which purchase-money hath been apportioned in the manner following, that is to say, the sum of £——, part thereof, has been deemed to be the price of the said copyhold hereditaments, and the sum of £——, the residue thereof, has been deemed to be the price of the said leasehold premises (*c*). NOW THIS INDENTURE WITNESSETH, that, in consideration of the said sum of £—— of lawful money &c., paid by the said [*purchaser*] to the said [*vendor*], at the time of the sealing and delivery of these presents, being part of the said entire purchase-money as aforesaid, the receipt of which said sum of £—— the said [*vendor*] doth hereby acknowledge, and from the same doth for ever discharge the said [*purchaser*], his heirs, executors, administrators, and assigns; He the said [*vendor*] doth hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said [*purchaser*], his heirs and assigns, that he the said [*vendor*] or his heirs shall and will, at the next court baron or customary court to be holden for the said manor of ——, in the said county of ——, or out of court, as soon as conveniently can be, on the request and at the costs of the said [*purchaser*], his heirs or assigns, surrender into the hands of the lord of the said ma-

—contract for sale.

Testatum.

In consideration —of an apportioned share of purchase-money, vendor covenants to surrender copyholds.

(*a*) *Vide ante*, p. 199.

COPYHOLDS FOR LIVES, AND LEASEHOLDS FOR RESIDUE OF A LONG TERM.

nor, according to the custom thereof, all and singular the copyhold or customary —— and hereditaments hereinbefore described, parcel of the said manor, and granted to the said [*vendor*] for the natural lives of the said [*cestuis que vie*], and the life of the survivor of them, as hereinbefore recited; To THE USE of the said [*purchaser*], his heirs and assigns, to the intent that the lord of the said manor may regrant the same copyhold or customary lands, tenements, or hereditaments to the said [*purchaser*], his heirs and assigns, for the natural lives of the said [*cestuis que vie*] and the life of the survivor of them; And that, thereupon, the said [*purchaser*] may be duly admitted tenant of the said copyhold premises, *To hold* the same at the will of the lord, according to the custom of the said manor, subject to the rents and services therefore due and of right accustomed.

Further *testatum.*

AND THIS INDENTURE FURTHER WITNESSETH, that, in consideration of the sum of £——, of lawful money aforesaid, paid by the said [*purchaser*] to the said [*vendor*] at or immediately before the sealing and delivery of these presents, (being the residue of the said sum of £——, the entire purchase-money for the said copyhold and leasehold premises as aforesaid), the receipt of which said sum of £—— the said [*vendor*] doth hereby acknowledge, and from the same doth for ever discharge the said [*purchaser*], his heirs, executors, administrators, and assigns, He the said [*vendor*] *Hath* bargained, sold, assigned, and transferred, and by these presents *Doth* &c., unto the said [*purchaser*], his executors, administrators, and assigns, ALL AND SINGULAR the said two several parcels of land and other hereditaments comprised in the hereinbefore recited indenture of lease, and which were thereby demised to the said [*lessee*] for the term of ten thousand years as aforesaid; *And also* all those two messuages or tenements, and all other the buildings since erected and built, and now standing and being on the same parcels of land, or any part thereof, Together with their and every of their rights, members, and appurtenances; And all the estate, &c.; To HAVE AND TO HOLD the said parcels of land, messuages or tenements, and all and singular other the hereditaments hereinbefore expressed to be hereby assigned, with their and every of their appurtenances, unto the said [*purchaser*], his executors, ad-

In consideration of residue of purchase-money, vendor assigns to purchaser leaseholds.

Habendum.

COPYHOLDS FOR LIVES, AND LEASEHOLDS FOR RESIDUE OF A LONG TERM.

ministrators, and assigns, from henceforth during all the residue and remainder now to come and unexpired of the said term of ten thousand years, granted by the hereinbefore recited indenture of lease, and for all other the estate, term, and interest of the said [*vendor*] therein; AND the said [*vendor*] doth hereby, for himself, his heirs, executors, and administrators, further covenant and agree with the said [*purchaser*], his heirs, executors, administrators, and assigns, in manner following, that is to say, that, notwithstanding any act, matter, or thing whatsoever, by him the said [*vendor*] at any time heretofore done, committed, or suffered to the contrary, he the said [*vendor*] now stands lawfully and absolutely seised of the said copyhold or customary lands and hereditaments hereinbefore described and covenanted to be surrendered, with the appurtenances, for an estate during the lives of the said [*cestuis que vie*], and the life of the survivor of them, at the will of the lord, according to the custom of the said manor of ——, without any condition, reservation, or any other matter or thing, to defeat, make void, determine, or incumber the same; *And also*, that, notwithstanding any such act, matter, or thing to the contrary as aforesaid, the said hereinbefore recited indenture of lease is a good and sufficient lease, valid in the law to all intents and purposes, and not forfeited, surrendered, charged, or incumbered in anywise howsoever; *And also*, that notwithstanding any such act, matter, or thing to the contrary as aforesaid, he the said [*vendor*] now hath in himself full power and absolute authority to surrender the said copyhold or customary lands and hereditaments hereinbefore covenanted to be surrendered, with the appurtenances, and to assign the said leasehold messuages or tenements, lands and hereditaments hereinbefore expressed to be hereby assigned, with the appurtenances, unto and to the use of the said [*purchaser*], his heirs, executors, administrators, and assigns respectively, in the manner aforesaid, and according to the true intent and meaning of these presents; *And further*, that it shall be lawful for the said [*purchaser*], his heirs, executors, administrators, and assigns respectively, from time to time and at all times hereafter, peaceably and quietly to enter into and upon, hold, and enjoy all and singular the said copyhold and leasehold lands, tenements, and hereditaments herein-

Covenants by vendor,

—that he is seised of copyholds;

—that lease is valid;

—that he hath right to surrender and assign;

—for peaceable enjoyment;

COPYHOLDS FOR LIVES, AND LEASEHOLDS FOR RESIDUE OF A LONG TERM.

before covenanted to be surrendered, and expressed to be hereby assigned, with their respective appurtenances, during the lives of the said [*cestuis que vie*], and the life of the survivor of them, according to the custom of the said manor of ——, with respect to the said copyhold premises, and during the residue now unexpired of the said term of ten thousand years, granted by the hereinbefore recited indenture of lease, with respect to the said leasehold premises; and to receive and take the rents and profits of all and singular the said copyhold and leasehold premises respectively, without any interruption or disturbance whatsoever by the said [*vendor*], his heirs, executors, or administrators, or any person or persons lawfully claiming from, by, under, or in trust for him or them; *And that* free and clear, and freely and clearly exonerated and discharged, or otherwise by him the said [*vendor*], his heirs, executors, or administrators, effectually kept indemnified of, from, and against all and all manner of former and other gifts, grants, estates, titles, charges, and incumbrances whatsoever, made, done, occasioned, or suffered by the said [*vendor*], or by any person or persons lawfully claiming from, by, under, or in trust for him or them, or by or through his acts, default, privity, or procurement; *And lastly*, that he the said [*vendor*], his heirs, executors, and administrators, and every other person lawfully claiming from, by, under, or in trust for him or them, will, from time to time and at all times hereafter, upon every reasonable request, and at the costs of the said [*purchaser*], his heirs, executors, administrators, or assigns, make, do, and execute, or cause to be made, done, and executed, All such further acts, deeds, conveyances, and assurances in the law whatsoever, for the more effectually surrendering, conveying, and assuring of the same copyhold or customary lands and hereditaments, with the appurtenances, unto and to the use of the said [*purchaser*], his heirs and assigns, according to the custom of the said manor of ——, during the residue which shall be then unexpired of the lives of the said [*cestuis que vie*], or the life of the survivor, and for the more effectually assigning and assuring of all and singular the said leasehold messuages, tenements, lands, and hereditaments, with the appurtenances, unto the said [*purchaser*], his executors, administrators, and assigns, during all the residue which shall

—free from incumbrances;

—and for further assurance.

be then unexpired of the said term of ten thousand years therein, as by the said [*purchaser*], his heirs, executors, administrators, or assigns respectively, or his or their counsel learned in the law shall be reasonably devised, or advised and required (*d*). IN WITNESS, &c.

COPYHOLDS FOR LIVES, AND LEASEHOLDS FOR RESIDUE OF A LONG TERM.

(*d*) The rent of the leaseholds being merely nominal, and the lease not containing any covenants on the part of the lessee, the usual covenant by the purchaser for the payment and performance of them is not inserted.

ASSIGNMENT *of Leaseholds by a* BANKING FIRM, *as Mortgagees* EMPOWERED *to* SELL, *and in which a* TRUSTEE *in whom the* LEGAL ESTATE *is vested* JOINS.

LEASEHOLDS BY MORTGAGEE FOR SALE.

THIS INDENTURE, ——, made the —— day of ——, BETWEEN [*vendors*], of —— Street, in the city of London, bankers, of the first part; [*trustee*], of &c., of the second part; and [*purchaser*], of &c., of the third part. WHEREAS, by indenture of lease *(recite lease)*; AND WHEREAS, by virtue of divers mesne assignments, or other sufficient assurances in the law, and particularly by an indenture of assignment, bearing date on or about the —— day of ——, and made, or expressed to be made (*a*), between [*assignors*],

Parties.

Recital of original lease.

Notice of assignments.

(*a*) The words "expressed to be made" are obviously designed to provide against the possible event of the recited deed not being executed by all the persons who are professed to be parties to it; and in such case, their insertion seems to be necessary to complete accuracy, since a deed cannot correctly be described to be "made" by a person who does not execute it. They would, of course, be particularly appropriate, when any of the professed parties to the deed refuse to execute it; as, where a trustee disclaims the trust estate intended to be vested in him. The deed of disclaimer reciting the trust deed should state it as a deed *expressed* to be made between the intended grantors and the trustee, who refuses the acceptance of the estate intended to be vested in him. This explanation rescues the term from the imputation of absurdity cast upon it by a learn-

As to the words "expressed to be made."

LEASEHOLDS BY MORTGAGEE FOR SALE.

therein described), of the first part; [*mortgagor*], (therein described), of the second part; and the said [*trustee*], of the third part; the said —— and premises, comprised in and demised by the said recited indenture of lease, with the appurtenances, were assigned to, or became legally vested in, the said [*trustee*], for all the residue of the said term of —— years, by the said indenture of lease granted, and subject to the rents and covenants therein contained, In trust for the said [*mortgagor*], his executors, administrators, and assigns, and to be assigned and disposed of as he or they should direct; AND WHEREAS, by an indenture bearing date on or about the —— day of ——, made between the said [*mortgagor*] of the one part, and the said [*vendors*] of the other part, for the considerations therein mentioned, he the said [*mortgagor*] did grant, bargain, sell, assign, transfer, and set over unto the said [*vendors*], their executors, administrators, and assigns, (amongst other things), the said —— and premises comprised in the said recited indenture, with their and every of their appurtenances, together with the said indenture of lease, and all mesne assignments thereof, *To hold* the same unto the said [*vendors*], their executors, administrators, and assigns, for and during the residue and remainder of the said term of —— years, *Upon trust*, at such time or times, and in such manner, as they, or the survivors or survivor of them, or the executors or administrators of such survivor, or their or his assigns (*b*), in their

Recital of the assignment to the vendors, in trust for sale.

Declaration of trusts for sale.

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ed writer, who considers it as implying the possibility of a deed being made by other persons than those named in it, which he truly states to be an implication unfounded in law. Coventry's Concise Convey. 45.

As to power of sale in mortgage deed being exercised by a transferee.

(*b*) It is important that a power of sale in a mortgage deed should be reserved, in express terms, to the *assigns* of the person in whom the power is vested; for, otherwise, the alienee of such person is unable to exercise the power; and the circumstance that the "assigns" are empowered to give receipts to purchasers, does not, according to the rigid construction which has been applied to these powers, extend the power of sale to them. Thus, in the case of *Bradford* v. *Belfield*, 2 Sim. 264, where, in 1794, by indentures of lease and release, A. conveyed an estate to B., his heirs and assigns, for the purpose of securing a sum of money advanced by C. to A.; and it was declared that the conveyance was made to B. *and his heirs*, upon special trust and confidence in him the said *B. and his heirs* reposed, and to the intent and purpose only,

or his discretion might think fit, absolutely to sell and dispose of the said —— and premises, either together or in

LEASEHOLDS BY MORTGAGEE FOR SALE.

that he and they should, as soon as to him and them should seem meet, upon request to him or them for that purpose, made by C., his executors, administrators, and assigns, make absolute sale and disposal of the fee-simple and inheritance of the estate, in such lots as he and they should think proper, and, out of the purchase-money, in the first place deduct to him the said B., his heirs, executors, and administrators, the expenses of executing the trusts, and next, to pay to C. the principal and interest due to him; and it was provided, that the purchasers under the indenture, paying their purchase-money to B., his heirs, executors, administrators, *and assigns*, should not be obliged to see to the application thereof, but that the receipts of B., his heirs, executors, administrators, *and assigns*, should be sufficient discharges to them for the same. In November, 1815, the heir-at-law of B., who died intestate, by the direction of the executors of C., who was also dead, assigned the principal and interest monies to E., and conveyed the estate in question to D., a trustee for him, in trust to sell, and out of the proceeds to pay the principal and interest monies to E. In 1823, D., in performance of the trust, sold the estate to the defendant, who objecting to the title, the present bill was filed to enforce the performance of the contract. Sir *L. Shadwell*, V. C., dismissed the bill. "The question," his Honour observed, "is, whether D., who was the assign of the heir of B., is able to make a title to the estate contracted to be sold. It has been argued, that, notwithstanding the trust is, by the words of the deed, expressly confined to B. and his heirs, according to the true construction of the instrument, his assigns might make the sale, especially as the proviso makes the receipts of his assigns sufficient discharges for the purchase-money. The necessity of discussing this point upon principle is superseded by the decision of the Court of King's Bench, in *Townsend* v. *Wilson*, 1 Barn. & Ald. 608; and, as the judgment in that case remains unreversed, it decides the question now under consideration. It has been correctly stated, that, in *Hall* v. *Dewes*, Jacob, 189, Lord *Eldon*, C., did not approve of that decision; but his Lordship felt himself bound by it, so that he would not compel the purchaser, in that case, to take the title. Now, in *Townsend* v. *Wilson*, the power of sale was given to three trustees and their heirs, and the money to arise by the sale was directed to be paid to the trustees and the survivors or survivor of them; so that, in that case, there was the very distinction that occurs in this. One of the trustees died, and the power was exercised by the two survivors; and the question was, whether that was a good execution of the power. The Court of King's Bench determined that it was not a good execution of the power. I therefore feel myself bound by the authority of *Townsend* v. *Wilson*, to say, that the title is not good."

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lots, and either by public auction or private contract, to any person or persons who should be willing to become the purchaser or purchasers of the same, or any of them, or any part thereof respectively, for the best price or prices that could be reasonably had or gotten for the same; and, for the purpose of effecting such sale or sales, to enter into, make, and execute all such contracts, agreements, acts, deeds, assignments, and assurances, as they or he should think proper; And it was, by the indenture now being recited, agreed and declared, that all such contracts, agreements, acts, deeds, assignments, and assurances, which should or might be entered into, made, and executed by the said [*vendors*], or the survivors or survivor of them, or the executors or administrators of such survivor, or their or his assigns, should or might be entered into, made, and executed, either with or without the concurrence of the said [*mortgagor*], his executors, administrators, or assigns, and whether he or they should join therein or assent thereto, and should be, to all intents and purposes whatsoever, valid and effectual, and bind the said [*mortgagor*], his executors, administrators, and assigns; and that the receipt

Sale to be with or without the concurrence of the assignor.

Vendors' receipt

Remarks upon *Townsend* v. *Wilson*, and *Bradford* v. *Belfield*.

The doctrine of the case of *Townsend* v. *Wilson* has been generally and justly condemned. It forms an exception to the liberality of modern determinations on the construction of instruments, in which it has been the anxious aim of the Courts to give effect to every clause and expression, and deduce a reasonable intention from the whole. Upon this principle, in the cases under consideration, the clause authorizing the "assigns" of the trustee to give discharges to the purchasers, afforded strong ground for enlarging the power to a corresponding extent. The construction adopted by the Court renders this part of the receipt clause altogether nugatory, and places a most inconvenient restriction on the power. The doctrine suggests caution, not only to mortgagees in framing their powers of sale, and to purchasers from them, but also to persons advancing money on the transfer of a subsisting security, to whom it may be a matter of some importance to ascertain that the property will be saleable in their hands, under the power of sale in the mortgage deed. Where the power is vested in a trustee, the difficulty may be avoided by leaving the legal estate in the old trustee, instead of conveying it to a trustee for the transferree. This might have been done in *Bradford* v. *Belfield;* for the heir of B., if the legal estate had remained in him, would clearly have been competent to have sold the property for the benefit of the transferree of the mortgage debt.

or receipts of the said [*vendors*], or the survivors or survivor of them, or the executors or administrators of such survivor, or their or his assigns, for any money to arise by the said sale or sales, or otherwise, by virtue of the indenture now in recital, should effectually discharge the person or persons to whom the same should be given from being answerable or accountable for the misapplication or nonapplication, or from being in anywise bound or concerned to see to the application of the money therein respectively mentioned to be received, or from being bound and concerned to inquire into the necessity or propriety of any sale or sales which might be made by virtue of the indenture now in recital; And it was declared, that the said [*vendors*], their executors, administrators, and assigns, should stand possessed of and interested in all and singular the monies to arise from the sale or sales of the said leasehold premises, and of and in the rents and profits thereof, until the same should be sold, Upon trust *(to pay expenses attending the execution of the trust, and pay themselves principal and interest monies, in the usual manner)*; And whereas the said [*mortgagor*] hath since departed this life, and there is now justly due and owing to the said [*vendors*] from his estate, for principal and interest upon or by virtue of the hereinbefore recited security, the sum of £——, or thereabouts, as they the said [*vendors*] do hereby respectively testify and declare; And whereas, by virtue of the trust, power, or authority for this purpose given to or vested in them the said [*vendors*], in and by the said last-recited indenture, They the said [*vendors*] caused the said —— and premises comprised in and demised by the said indenture of lease, and intended to be hereby assigned, to be put up to sale by public auction in one lot, at the auction mart in the city of London, on the —— day of —— last; and the said [*purchaser*], being the highest bidder at such auction, was duly declared and became the purchaser thereof, at or for the price or sum of 2000*l.*; And whereas the said [*trustee*], at the request of the said [*vendors*], hath agreed to make and execute, or join in the assignment of the said premises to the said [*purchaser*], in the manner hereinafter mentioned and expressed. NOW THEREFORE THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of 2000*l.*, of lawful money

to be a good discharge.

Purchasers not to be accountable for misapplication of the purchase-money.

Trusts of the proceeds of sale.

Recital of the death of mortgagor, and that a sum was due to mortgagees.

—That, under the trusts of the above indenture, vendors caused the premises to be put up to sale by auction.

—Sale to purchaser.

—that trustee had agreed to join.

Testatum.

In consideration

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of Great Britain and Ireland, to the said [*vendors*], as the trustees for the purposes of the said recited indenture of the —— day of ——, at or before the sealing and delivery of these presents, paid by the said [*purchaser*], the receipt of which said sum they the said [*vendors*] hereby respectively acknowledge, and from the same *Do*, and each of them *Doth* acquit and for ever discharge the said [*purchaser*], his heirs, executors, and administrators by these presents; *And also* in consideration of the sum of 10*s.*, of like lawful money, to the said [*trustee*] at the same time paid by the said [*purchaser*], the receipt whereof is hereby also acknowledged, he the said [*trustee*], at the request and by the direction of the said [*vendors*], (testified by their severally executing these presents), *Hath* bargained, sold, assigned, and transferred, and by these presents *Doth* bargain, &c.; And the said [*vendors*], by virtue and in exercise of the trust, power, or authority to them for this purpose given or reserved by the said recited indenture of the —— day of ——, and of every or any other trust, power, or authority whatsoever in anywise enabling them in this behalf, *Have*, and every of them *Hath* bargained, sold, assigned, ratified, and confirmed, and by these presents *Do*, and every of them *Doth* bargain, &c. unto the said [*purchaser*], his executors, administrators, and assigns, ALL THAT the aforesaid ——, and all and singular other the premises whatsoever (if any) comprised and demised by the said recited indenture of lease, and mentioned or intended so to be, with their and every of their rights, members, and appurtenances; *And also* all the estate, right, title, interest, term of years yet to come and unexpired, benefit, advantage, claim, and demand whatsoever, both at law and in equity, of them the said [*trustee*] and [*vendors*], and each and every of them, in, to, or out of the said hereby assigned premises, together with the said recited indenture of lease, and all mesne assignments thereof, and all benefit and advantage of the same respectively; TO HAVE AND TO HOLD the said ——, and all and singular other the premises hereby bargained, sold, assigned, and confirmed, or intended so to be, with their appurtenances, unto the said [*purchaser*], his executors, administrators, and assigns, from henceforth, during all the residue and remainder now unexpired of the said term of ——, granted by the said indenture of lease as aforesaid; But subject nevertheless to the rents, cove-

of purchase-money paid to vendors, and for nominal consideration to trustee—

Trustee, by the direction of vendors, assigns, and vendors confirm.

Parcels.

All the estate, &c.

Habendum to purchaser for the residue of term.

nants, and agreements, in and by the said indenture of lease reserved and contained, and on the tenant's or lessee's part to be paid, observed, and performed. *(Covenant by trustee that he has not incumbered).* And each of them the said [*vendors*], for himself, his heirs, executors, and administrators, and so far as relates to or concerns his own respective acts and deeds or defaults only, doth covenant and agree with the said [*purchaser*], his executors, administrators, and assigns, by these presents in manner following, that is to say, that they the said [*vendors*] have not, nor have or hath any or either of them, at any time heretofore made, done, executed, or permitted any act, deed, matter, or thing whatsoever, by means whereof the said —— and premises hereby assigned, or intended so to be, or any part thereof, are or is impeached, assigned, charged, or incumbered in anywise howsoever; *And likewise* (*c*), that they

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Covenant by trustee of legal estate, that he has not incumbered.

Several covenant from the three trustees for sale that they had not incumbered.

And for further assurance.

(*c*) Though trustees generally object to enter into a covenant for further assurance, yet in such a case as the present, where the purchase-money goes into their hands, and in a qualified sense for their own benefit, it seems not unreasonable to require such a covenant from them. Indeed, the objection is frequently urged in a manner which seems to invest the covenant with imaginary terrors; for its actual operation is nothing more than an engagement by a person who has already professedly conveyed property, to execute a further assurance in case the present conveyance should prove to be defective, at the expense of the person requiring such further act.

As to the covenant for further assurance.

There is much tautology in the ordinary forms of the covenant for further assurance; for instance, the word *reasonable* or *reasonably* occurs no less than three times. The assurances are to be made upon every "reasonable" request, and they are to be such "reasonable" assurances as the covenantee may "reasonably" require. The use of the word in the third instance renders it superfluous in the first and second.

What is a "reasonable act" within the meaning of this covenant has often been the subject of controversy. In an early case it was held, that a bond for the performance of covenants, one of which was, that A. at all times, at the request and charges of B., should make, execute, and suffer such reasonable assurances of certain lands to B. or his heirs, as he or they should reasonably require, was not broken by the neglect to levy a fine, which was prevented by A. having become *non compos mentis;* on account of which, the Justices of Assize refused to take her acknowledgment; for it was said, "the words are general, to make such reasonable assurances, which &c.; but if the

Incapacity from sickness, an excuse for non-performance.

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the said [*vendors*], or their respective executors and administrators, and every other person lawfully claiming any

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words had been special, to acknowledge a fine, there, if the Justice doth refuse to take such acknowledgment, the bond is forfeited, for the party hath taken upon him that it should be done." *Pet* v. *Cally*, 1 Leon. 304. But even where the covenant is expressly to levy a fine, severe sickness, according to another early authority, excuses for the non-performance of it. Thus, in an anonymous case, in Moore, 124, it was ruled, that the condition of a bond, that the obligor and his wife should levy a fine, upon reasonable request, was not broken where the performance was prevented by the perilous sickness of the wife; for it was not "reasonable" to require her to levy a fine under such circumstances.

Refusal to do an "unnecessary act" no breach.

The refusal to do an unnecessary act is not a breach of the covenant in question. Thus, where certain lands had been demised by the defendant to trustees, upon trust, among other things, to raise at a contingent but eventual period 1100*l.*, to be paid to the person to whom one of the plaintiffs was administratrix, or to his wife and children; and the defendant covenanted, on and at the request and costs, and in the manner therein mentioned, to make, do, acknowledge, execute, and suffer, or cause &c. all other lawful and reasonable acts, things, devices, conveyances, and assurances in the law, for further &c. (among other things), raising the said 1100*l.* according to the intent of the indenture, as by the said intestate or his counsel should be advised and required: The Court declared the defendant not bound to comply with the plaintiff's request, that the defendant should direct the trustees to take up at interest the 1100*l.* and pay the same to the plaintiffs, because such an act was an unnecessary act, and therefore not a reasonable act, or one which would be required by law, and consequently not within the terms of the covenant stated. *Warn* v. *Bickford*, 9 Price, 43. However, in an early case, in which it was objected to an action for breach of a covenant for further assurance, in not acknowledging the note of a fine, that it was not shewn that any writ of covenant was depending at the time of the request, without which no fine could be levied, the objection was overruled, on the ground that, "whether it was well levied, or to no purpose, was not material; the covenantor was bound to perform his covenant by acknowledging this fine." Another objection taken was, that the fine was levied of more than it ought to have been; but this also was overruled, the circumstance being not material, for, of the residue, the fine was to the use of the conusor himself. *Boulney* v. *Curteys*, Cro. Jac. 251; *S. C.* Moore, 810.

Counsel must advise assurances to be executed.

Where the covenant is to make such assurances as the counsel of the covenantee shall advise, the assurance required to be executed must be shewn to have been advised by counsel; for the plea, *quod consilium non dedit advisamentum* is said to be a good defence to an action on such a cove-

estate, right, title, or interest in or to the said —— and premises hereinbefore mentioned to be hereby as- LEASEHOLDS BY MORTGAGEE FOR SALE.

nant, *Bennet's* case, Cro. El. 9, even though the covenantee who devised the assurance were himself learned in the law. *Rosewell's* case, 5 Rep. 19 b. But it is not necessary that the advice should be given directly to the covenantor: it may be given by the counsel to the covenantee who consulted him, and by whom it should be notified to the covenantor. *Higginbotham's* case, 5 Rep. 20 a. The covenant for further assurance, however, now in use, is not couched in the exact terms in question; it is not simply to make such assurances as the counsel of the covenantee shall advise, but as the covenantee *or* his counsel shall advise and require. According to the literal import of the covenant, therefore, the language of which is alternative, it would be sufficient that the act were required by the covenantee, though not advised by his counsel; but, as this reduces the latter branch of the clause to silence, (for, if the advice of counsel is not requisite, why is it referred to at all?), in all probability the several members of the sentence would be construed as cumulative; and certainly a person would be very ill advised, who, relying on the contrary construction, should bring an action on the covenant for the non-performance of an act which had not been advised by counsel. In the demand or request to the covenantor to execute any given assurance, which will necessarily precede any action on the covenant, the fact of its having been so advised ought to be notified and made evident to him. A distinction is taken, in one of the cases, between the words "advise" and "devise;" the former, it was thought, only requiring that counsel should advise generally on the nature of the assurance, the latter, that he should prepare the instrument tendered for execution. *Stafford's* case, Moore, 595.

Opportunity should be given to the covenantee to examine the assurance required to be executed.

A covenantor called upon to make further assurance, should have an opportunity of examining the contents of the instrument he is required to execute; and it would be prudent to send him the draft of the intended instrument, for perusal, according to the present course of practice. In *Bennet's* case, Cro. El. 9, A. covenanted with B. to make such assurance as his counsel should advise; and the Court held clearly, that B. must give notice of the assurance; for, otherwise, A. doth not know his counsel, or their advice; and B. is not only to shew him the assurance that he is to make, but is to permit him to read it, and to go to his own counsel to consider it; and A. is to have convenient time, after the assurance shewn to him, to perfect it.

It seems, that if a man undertakes to make an assurance by a certain day, he is bound to do it without any request, though, if an assurance be tendered, he must execute it; and even if it is to be at the costs of the covenantee, the first act must proceed from the covenantor, namely, to

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signed, or any part thereof, by, from, through, under, or in trust for them, or any of them, will, from time to time and at all times hereafter, during the residue of the said term hereby assigned, at the request, costs, and charges of the said [*purchaser*], his executors, administrators, or assigns, make and execute, or cause to be made and executed, all such further acts, deeds, assignments, and assurances in the law whatsoever, for the more effectually assigning, assuring, and confirming the said —— and premises, with the appurtenances, unto the said [*purchaser*], his executors, administrators, and assigns, for all the residue which shall be then unexpired of the said term of —— years, as by the said [*purchaser*], his executors, administrators, and assigns, or his, their, or any of their counsel shall be reasonably devised or advised and required. *(If so intended, insert covenant by purchaser to pay rent and perform covenants of lease as in former precedents (d).)* IN WITNESS, &c.

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notify to the covenantee what manner of assurance he will make, that he may know what money to tender. Shepp. Touch. 167; see, also, *Rolt* v. *Neale*, Dyer, 371 a.

This reasoning, of course, only applies where the covenant does not specify the nature of the assurance; but, where it does, it would be advisable for the covenantor to intimate his readiness to perform the covenant on receiving the costs.

As to executing distinct assurances.

Another distinction laid down in the early authorities is, that where the covenantor binds himself, at his own costs, to make such an assurance of all his land, as another shall devise and require, he is not obliged to execute several assurances of distinct parts; but, *contra*, where the assurances are to be at the costs of the person requiring them. *Washington* v. *Burgon*, Moore, 570. But questions of this nature are precluded by the present form of the vendor's covenant for further assurance, which throws upon the purchaser, as well the task of devising and tendering the assurances to be executed, as the expense of preparing them. See further as to this covenant, *ante*, Vol. 7, p. 465.

As to the indemnity covenant.

(*d*) In the draft from which this precedent was taken the purchaser entered into a covenant with the vendors to pay the rent and perform the covenants of the lease, and indemnify them therefrom; but the Editor has omitted the covenant, because there seems to be considerable doubt whether, where the vendors of leaseholds, being trustees for

sale, are not themselves liable to the rents and covenants, except as assignees, *i. e.* for breaches during their ownership, a purchaser can be required, without a special stipulation, to enter into such a covenant. The better opinion is, that he cannot, for the reasons stated in a former note, *vide ante*, Vol. 7, p. 488, *vide* also, *ante*, p. 89. An exemption of this kind may be considered as in the nature of a set-off against the disadvantage which a person dealing with a trustee-vendor is under in having no covenants for title. If the person who is interested in requiring an indemnity-covenant voluntarily enters into covenants for title, which not unfrequently happens, it seems fair that a covenant of indemnity should be stipulated for on his behalf.

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CONVEYANCE *in Fee to a* PURCHASER *by* TRUSTEES, *under an* ACT *of* PARLIAMENT, *for effecting a Sale of certain settled Estates* (*a*), *which were inconveniently detached from the Bulk of the Family Property.*

UNDER POWER IN ACT OF PARLIAMENT.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*trustees for sale*], of &c., of the first part; [*tenant*

Parties.

(*a*) In preparing conveyances by trustees for sale, who derive their authority from an act of Parliament, care should be taken to adhere as closely as possible to the terms of the act, the provisions of which usually describe the manner of executing the trust, in some particulars at least, with so much explicitness, that the recitals of the deed are little more than an echo of the act. The enactment which vests the property in the vendors, and prescribes the mode of the sale, and of the payment of the purchase-money, it is usual and proper to state at length; though the verbosity of such acts sometimes leads to a departure from this plan, especially in small purchases, and then the substance only of the enacting clause is stated. The recitals of the act, which explain its object, are frequently stated; but this is only necessary where, as in the present instance, they are explanatory of something to be done in regard to the purchase, as it is enough for the purchaser that the Legislature has thought fit to render the estate saleable, without entering into the reasons for its doing so. Here, the circum-

Remarks upon the precedent.

UNDER POWER IN ACT OF PARLIAMENT.

for life], of &c., of the second part; [*purchaser*], of &c., of the third part; and [*trustee to prevent dower*], of &c., of the fourth part. WHEREAS, *(recite will of late owner, whereby he devised his lands in the several parishes of —— and ——, in the county of York, and in the parish of ——, in the county of Lincoln, and elsewhere, to the party of the second part, during his life, with remainder to trustees to preserve contingent remainders; with remainder to his first and other sons successively, in tail male; with remainders to his daughters in tail general; with remainder to the second tenant for life and his issue, in like manner; also, the death of the testator, and probate of his will).* AND WHEREAS, by an act of Parliament passed in the —— year of his late Majesty King George the Fourth, intituled "An act for vesting certain detached settled estates, late of [*testator*], deceased, in trustees, to sell the same, and to lay out the monies thence arising in the purchase of other estates, to be settled to the same uses;" *after reciting,* among other things, the said will of the said testator, deceased, to the effect hereinbefore recited; *And also reciting,* that the said [*tenant for life*] was in the possession and receipt of the rents and profits of the messuages, farms, lands, and hereditaments in the parishes of —— and ——, in the county of York, and in the county of Lincoln, as the first tenant for life thereof, under the limitations thereof in the said recited will contained; *And also reciting,* that the said [*tenant for life*], in or about the month of ——, intermarried with [*wife*], daughter of [D. M.], late of &c., deceased, who was then living, and by whom he had issue then living two sons and one daughter, *viz.* [L., S., and G.], all of whom were infants under the age of twenty-one years; *And also reciting,* that the said [*second tenant for life*], in or about the month of ——, intermarried with [*wife*], but he had then no issue; *And also reciting,* that the said [*ten-*

Recital of will.

Recital of the act of Parliament.

Which recited that tenant for life was in possession.

—His marriage.

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stances as to the redemption of the land-tax rendered it necessary, or rather convenient, to state the recitals in the act. Sometimes, where lands are made saleable by act of Parliament, the sale is to be made under the direction of the Court of Chancery; in which case, the recitals of the deed in some respects correspond with those of the precedent in the text, and in others, with the form of the conveyance where the sale is made in pursuance of a decree, *vide ante,* p. 101.

UNDER POWER IN ACT OF PARLIAMENT.

ant for life] some time since, under the powers of certain acts of Parliament made and then in force, for the redemption and sale of the land-tax (*b*), purchased the land-tax then charged upon all the messuages, farms, lands, tenements, and hereditaments, of which he was tenant for life as aforesaid, amounting to the yearly sum of £——, the consideration for which purchase was the sum of £—— Bank Three *per cent.* Reduced Annuities, and £—— Three *per cent.* ConsolidatedAnnuities, transferred by him the said [*tenant for life*] to the commissioners for liquidating the national debt, pursuant to the directions of the said acts of Parliament in that behalf; *And also reciting*, that the most considerable part of the family property of the said [*tenant for life*] and [*second tenant for life*] was situate in the counties of Gloucester and Somerset, and it would be convenient that the whole of their estates, instead of being unconnected and dispersed, as they then were, should lie as near as might be together, or in the same vicinity; *And also reciting*, that the aforesaid messuages, farms, lands, tenements, and hereditaments, situate respectively in the parishes of —— and —— in the county of York, and of —— in the county of Lincoln, respectively, devised by the said recited will, and of which the said [*tenant for life*] was first tenant for life as aforesaid, were situated at great distances from each other, and the whole of the same were far distant from the said counties of Gloucester and Somerset, by reason whereof it would be greatly for the convenience, as well of the said [*tenant for life*] and his issue, as of the said [*second tenant for life*], (if he should thereafter have any issue), that the said estates should be sold, and that the money to arise from and be produced by such sale should be applied, in the first place, in paying and discharging all expenses attending such sale or sales, and, in the next place, in replacing to the said [*tenant for life*] the said two sums of £—— Bank Three *per cent.* Reduced Annuities, and £—— Three *per cent.* Consolidated Annuities, so transferred by him for the purchase of the land-tax then lately charged upon the same

—That tenant for life had redeemed the land-tax.

—That the family property of the tenant for life was situate at a great distance from the devised estates.

—That it would be convenient that the devised estates should be sold.

(*b*) *Vide* the land-tax redemption act, 42 Geo. 3, c. 116, s. 10, stated *ante*, Vol. 3, p. 392, 2nd edition.

UNDER POWER IN ACT OF PARLIAMENT.

estates, and that the residue of such money should be laid out in the purchase of other estates and hereditaments in the said county of Somerset, or in the adjoining counties of Gloucester and Devon, or in some or one of them, to be settled to the uses declared by the will of the said [*testator*], deceased, of and concerning the said hereditaments so to be sold as aforesaid, or such and so many of those uses as might be subsisting and capable of taking effect; *And also reciting*, that, by reason of the infancy of the children of the said [*tenant for life*], then born, and the limitations in the said recited will to the sons and daughters of the said [*tenant for life*], and to the sons and daughters of the said [*second tenant for life*] respectively, in the manner therein and hereinbefore mentioned or recited, the purposes aforesaid could not be effected without the aid of Parliament: *It was thereby enacted*, that, from and immediately after the passing of the said act, all those the said messuages, lands, and hereditaments, situate, lying, and being in the parishes of —— and ——, in the said county of York, and in the parish of —— in the county of Lincoln, (which included the messuage, lands, and hereditaments hereinafter described, and intended to be hereby granted and released), or in some adjacent or adjoining parishes, comprised in the said recited will of the said [*testator*], deceased, and by him thereby devised to the said [*tenant for life*], and more particularly mentioned and described in the schedule to the now being recited act annexed, with their and every of their rights, members, and appurtenances, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, should be vested and settled upon, and the same were thereby absolutely vested in and settled upon the said [*trustees for sale*], their heirs and assigns, *To the use* of the said [*trustees for sale*], their heirs and assigns, for ever, freed and absolutely acquitted, exonerated, and discharged of and from all and singular the uses, estates, devises, limitations, trusts, entails, remainders, reversions, powers, provisoes, declarations, charges, and incumbrances whatsoever, in and by the said will of the said [*testator*], deceased, limited, expressed, declared, or contained of or concerning the same respectively, or any part or parts thereof, (save and except any legal lease or leases, or legal agreement for any lease or

It is then enacted that the devised estates in Yorkshire and Lincolnshire, should be vested in the trustees for sale.

Free from the limitations in the will.

leases, which had been granted or entered into for the same premises, or any part thereof); but nevertheless, In trust that they the said [*trustees for sale*], and the survivor of them, and the heirs and assigns of such survivor, did and should, as soon as conveniently might be, with the consent in writing of the said [*tenant for life*], during his life, make sale and dispose of the said messuages or tenements, and other hereditaments thereby vested and settled as aforesaid, or any part or parts thereof, either together or in parcels, and either by public auction or private contract, unto any person or persons who should be willing to become the purchaser or purchasers thereof, for the most money that could be reasonably had and gotten for the same, and upon payment into the bank, in the manner thereinafter mentioned, of the purchase-money for which the said hereditaments, or any part or parts thereof should be so sold, did and should convey, grant, and assure the same hereditaments so to be sold and disposed of as aforesaid, unto and to the use of the purchaser or purchasers thereof, his, her, or their heirs or assigns, or as he, she, or they should direct or appoint, freed and discharged as thereinbefore was mentioned; *And it was further enacted*, that so much of the said several sums of money to arise from, or be paid as the consideration-money of the sale of the said messuages or tenements, lands, and other hereditaments, as the said [*trustees for sale*], or the survivor of them, his heirs or assigns should require, should be applied by the person or persons so purchasing the same in or towards the purchase of the several sums of £——, Reduced Three *per cent.* Bank Annuities, and £——, Three *per cent.* Consolidated Annuities, for the purpose of replacing the like sums transferred by the said [*tenant for life*] for the purchase of the land-tax as aforesaid; And that the receipt or receipts of the said [*tenant for life*], for the part or parts thereof which should be so replaced, should be a sufficient discharge and discharges to the person or persons replacing the same, for the monies laid out in the purchase thereof respectively; *And it was further enacted*, that all and every sum and sums of money to arise from any sale or sales, made in pursuance of the act now being recited of the said messuages or tenements, and other hereditaments thereby made sale-

UNDER POWER IN ACT OF PARLIAMENT.

In trust for sale.

And to convey and assure the premises to purchasers, or as they should direct.

Purchase-money, how to be applied—

(After replacing to the tenant for life, certain Bank Annuities), to be paid

UNDER POWER IN ACT OF PARLIAMENT.

into the Bank of England.

able as aforesaid, or any part of the same which should not be applied in or towards the replacing of the said several sums of Bank Annuities, should be paid by any person or persons to whom such sales should be so made, into the Bank of England in the name and with the privity of the Accountant-general of the High Court of Chancery, to be placed to his account there—"*Ex parte* the purchasers of the estate late of the said [*testator*], deceased," pursuant to the method prescribed by the act of the twelfth year of the reign of his late Majesty King George the First, chapter the thirty-second, and the general orders of the said Court, and without fee or reward, according to the act of the twelfth year of the reign of his Majesty King George the Second, chapter twenty-four; *And it was further enacted*, that the certificate and certificates of the said Accountant-general, together with the receipt of one of the cashiers of the Bank of England thereto annexed, and therewith filed in the Register-office of the said Court of Chancery, of the payment into the Bank of England by the purchaser or purchasers of the hereditaments thereby authorized to be sold, or any of them, or any part thereof, of his, her, or their purchase-money, should, from time to time and at all times, be a good and sufficient release and discharge to such purchaser or purchasers, and his, her, and their heirs, executors, administrators, and assigns, for so much of the said purchase-money for which such certificate or certificates, or such receipt or receipts should be so given; and, after filing such certificate or certificates and receipt or receipts, such purchaser or purchasers, and his, her, or their heirs, executors, administrators, and assigns, should be absolutely and for ever freed and discharged of and from the said purchase-money, and should not be answerable or accountable for any loss, misapplication, or non-application thereof, or of any part thereof; AND WHEREAS the messuages, lands, and hereditaments hereinafter described, and intended to be hereby released, (being part of the said estates and hereditaments by the said recited act directed to be sold by the said [*trustees for sale*], as aforesaid, and being lots one and two, respectively, in the particulars of sale of the same estates), were on the —— day of ——, by virtue and in pursuance of the said recited act, with the consent of the said [*tenant for life*], put up to sale by public

Certificate of Accountant-general, and receipt of cashier of bank, to discharge purchasers.

Recital of sale, pursuant to the act of Parliament.

auction, and at which auction the said [*purchaser*], as the best bidder for both the same lots, was declared the purchaser thereof at or for the price or sum of £——; AND WHEREAS the said sums of £——, Reduced Three *per cent.* Bank Annuities, and £——, Three *per cent.* Consolidated Annuities respectively, transferred by the said [*tenant for life*] for the purchase of the land-tax as aforesaid, have been replaced by and out of the sum and sums of money arising from the sale of such of the said messuages or tenements, lands and hereditaments, as are situate in the county of York, and by the said recited act made saleable as aforesaid, which the said [*tenant for life*] doth hereby acknowledge and declare; AND WHEREAS the said [*purchaser*] hath, at or immediately before the sealing and delivery of these presents, paid the sum of £—— of lawful money of Great Britain and Ireland, in full for such purchase as aforesaid, into the Bank of England in the name and with the privity of the Accountant-general of the High Court of Chancery, to be placed there—"*Ex parte* the purchasers of the estate of the late [*testator*] deceased," pursuant to the directions in the said hereinbefore in part recited act, and the method prescribed by the act of the twelfth year of the reign of his late Majesty King George the First, chapter thirty-two, and the general orders of the said Court, as appears by the certificate of the said Accountant-general, together with the receipt of one of the cashiers of the Bank of England thereto annexed, and intended to be both forthwith filed of record in the Register-office of the said Court of Chancery (*c*). NOW THIS INDENTURE WITNESSETH, that, in pursuance and by virtue of the trust, power, and authority, vested in the said [*trustees for sale*] by the said recited act, and of all other powers enabling them so

UNDER POWER IN ACT OF PARLIAMENT.

—That Bank Annuities had been replaced.

Payment of purchase-money into the Bank of England.

Testatum.

In consideration of purchase-money paid into the Bank of England.

(*c*) Where the sale is by auction, a deposit is generally made at the time of the sale, which goes into the hands of the auctioneer or vendor's agent; but this of course will be invested pursuant to the direction of the act, before the execution of the conveyance, and then it is unnecessary to notice the temporary mode of payment. Sometimes, the auctioneer's charges are proposed to be taken out of the sum invested, but this a purchaser should not assent to.

UNDER POWER IN ACT OF PARLIAMENT.

to do, and in consideration of the sum of £—— of lawful money of Great Britain and Ireland, by the said [*purchaser*] paid into the Bank of England in the name and with the privity of the Accountant-general of the High Court of Chancery, and placed there *Ex parte* the purchaser of the estate late of the said [*testator*] deceased, as hereinbefore recited, the payment of which said sum of £—— in manner aforesaid, they the said [*trustees for sale*], and also the said [*tenant for life*], *Do*, and every of them *Doth* hereby acknowledge, and therefrom acquit and discharge the said [*purchaser*], his heirs, executors, administrators, and assigns for ever by these presents; *And also*, in consideration of the sum of 10*s*. of like lawful money, to each of them the said [*trustees for sale*] and [*tenant for life*], in hand paid by the said [*purchaser*], at or immediately before the execution of these presents, the receipt whereof is hereby acknowledged, They the said [*trustees for sale*], with the consent and approbation of the said [*tenant for life*], (testified by his executing these presents), *Have*, and each of them *Hath* granted, bargained, sold, and released, and by these presents *Do*, and each of them *Doth*, &c., and the said [*tenant for life*] *Hath* ratified and confirmed, and by these presents *Doth* &c., unto the said [*purchaser*], (in his actual possession, &c.), and to his heirs, ALL *(describe parcels, and general words)*; And the reversion, &c; And all the estate, &c.; And all deeds, evidences, and writings, touching or concerning the said premises, or any part thereof, either exclusively or in common with other hereditaments of inferior value, in the custody or power of the said [*trustees for sale*] and [*tenant for life*], or any of them, or which they or any of them can or may obtain without suit at law or in equity; And true and attested copies of all such other deeds, evidences, and writings, in their or any of their custody, or within their or any of their control, as aforesaid, which concern the said premises jointly with other hereditaments of greater value; all such copies thereof as shall be now required, to be made and delivered at the costs and charges of the said [*tenant for life*], but all future copies to be made and taken at the expense of the said [*purchaser*], his heirs or assigns; TO HAVE AND TO HOLD the said messuages, lands, hereditaments, and all and singular other the premises here-

Trustees, with the consent of tenant for life, convey, and tenant for life confirms.

Parcels.

Deeds.

Attested copies.

Habendum to purchasers.

UNDER POWER IN ACT OF PARLIAMENT.

inbefore described, and hereby granted and released, or intended so to be, with their appurtenances, unto the said [*purchaser*], his heirs and assigns, for ever, freed and absolutely acquitted, exonerated, and discharged, of and from all and singular the uses, estates, devises, limitations, trusts, entails, remainders, reversions, powers, provisoes, declarations, charges, and incumbrances whatsoever, in and by the said will of the said [*testator*] deceased, limited, expressed, declared, or contained, of or concerning the same respectively, or any part or parts thereof, *To the uses*, upon the trusts, and for the intents and purposes hereinafter declared concerning the same, (that is to say), *(uses to prevent dower, ut ante, Vol.* 7, p. 461*)*. *(Covenant by trustees for sale that they have not incumbered).* AND the said [*tenant for life*], for himself, his heirs, executors, and administrators, doth covenant and agree with the said [*purchaser*] and his heirs, by these presents, in manner following, (that is to say), that, notwithstanding any act, deed, matter or thing whatsoever, made, done, executed, or suffered by him the said [*tenant for life*], or by the said [*trustees for sale* (*d*)], or the said [*testator*] deceased, or any person or persons lawfully claiming through or under him the said [*testator*] to the contrary, they the said [*trustees for sale*] and [*tenant for life*], or some or one of them, now [are or is lawfully, rightfully, and absolutely seised of the said messuages, lands, hereditaments, and premises hereinbefore mentioned to be hereby granted and released, with their appurtenances, of an absolute and indefeasible estate of inheritance in fee-simple in possession, without any condition, proviso, power of revocation, limitation of use or uses, or other matter, restraint, cause, or thing whatsoever, which can or may alter, revoke, make void, incumber, or determine the same; *And also*, that, notwithstanding any such act, deed, matter, or thing, as aforesaid, they the said [*trustees for sale*] and

Discharged from limitations of will.

Limitations to prevent dower.

Covenant that trustees have not incumbered.

Covenants by tenant for life,

—that trustees are lawfully seised

—and have power to convey.

(*d*) There is a peculiarity in these covenants, in expressly extending them to the acts of the trustees for sale, which is necessary here, if it be intended that the covenants shall extend to those acts; because the trustees, deriving their title, not from the testator, but under the act of Parliament, are not included in the denomination of persons claiming under him. *Vide ante*, Vol. 7, p. 570.

UNDER POWER IN ACT OF PARLIAMENT.

[*tenant for life*], or some or one of them now] have or hath in themselves or himself full power and lawful and absolute authority, by these presents, to convey and assure the said messuages, lands, hereditaments, and premises, hereinbefore mentioned to be hereby granted and released, with their appurtenances, to the uses, upon the trusts, and for the intents and purposes hereinbefore limited and declared concerning the same, according to the true intent and meaning of these presents; *And further*, that the same messuages, lands, hereditaments, and premises, with their appurtenances, shall, and lawfully may, from time to time and at all times hereafter, remain, continue, and be, To the uses, upon the trusts, and for the intents and purposes hereinbefore declared concerning the same, and shall and may be peaceably and quietly held and enjoyed, and the rents and profits thereof received and taken accordingly, without the lawful interruption or disturbance of the said [*trustees for sale*] and [*tenant for life*], or any of them, their or any of their heirs or assigns, or of any other person or persons lawfully claiming from, through, or under the said [*testator*] deceased; *And that* free and clear, and freely and clearly discharged, or otherwise, by him the said [*tenant for life*], his heirs, executors, or administrators, effectually kept indemnified of, from, and against all and all manner of former and other [gifts, grants, bargains, sales, leases, mortgages, estates, jointures, dowers, and right and title of dower, uses, trusts, wills, entails, rents, arrears of rent, statutes, recognizances, judgments, extents, executions], titles, charges, and incumbrances whatsoever, made, created, occasioned, or suffered, by the said [*trustees for sale*], or the said [*tenant for life*], and [*testator*] deceased, or any other person or persons whomsoever, claiming from, through, under, or in trust for him or them, or any of them; *And moreover*, that he the said [*tenant for life*] and his heirs, and the said [*trustees for sale*], and the survivor of them and his heirs, and all and every other person and persons whosoever, lawfully claiming any estate, right, title, trust, or interest of, in, to, or out of the said messuages, lands, hereditaments, and premises, intended to be hereby granted and released, with the appurtenances, or any part thereof, shall and will, from time to time, and at all times hereafter, upon

—for peaceable enjoyment.

—free from incumbrances.

Covenant for further assurances.

every request, and at the costs and charges of the said [*purchaser*], his heirs, appointees, or assigns, make, do, acknowledge, levy, suffer, and execute, or cause to be made, done, acknowledged, levied, suffered, and executed, all and every such further acts, deeds, conveyances, and assurances in the law whatsoever, for the more effectually granting, conveying, assuring, and confirming of the same messuages, lands, hereditaments, and premises, with their appurtenances, unto and to the use of the said [*purchaser*], his heirs, appointees, and assigns, for ever, or otherwise, as he the said [*purchaser*], his heirs, appointees, or assigns shall direct or appoint, be the same by fine or fines, common recovery or recoveries, or any other matter of record or not of record, or otherwise howsoever, as by the said [*purchaser*], his heirs, appointees, or assigns, or his or their counsel learned in the law shall be reasonably advised, devised, or required. IN WITNESS, &c.

UNDER POWER IN ACT OF PARLIAMENT.

BARGAIN *and* SALE *(to be enrolled), of* COPYHOLD *Lands by a* TENANT *for* LIFE *under a* POWER *in an* INCLOSURE ACT, *to* DEFRAY *the Expenses of the* INCLOSURE, *the Commissioners being made Parties according to the Directions of the Act* (*a*).

BY TENANT FOR LIFE, UNDER AN INCLOSURE ACT.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*tenant for life*], of &c., of the first part; [*commis-* Parties.

(*a*) The General Inclosure Act (41 Geo. 3, c. 109) does not authorize tenants for life to *sell*, in order to defray the expenses of the inclosure, but merely to *charge* the allotments with those expenses. The precedent of a mortgage deed of this nature has been given under a former title, *vide ante*, Vol. 6, p. 98. Where a tenant for life pays the expenses attending the inclosure, though he does not expressly charge them upon the estate as empowered to do by the act, his representatives will have a claim on it for the sum so expended; and the same principle has been held to apply where the payment was made by the owner of a defeasible fee. *Drinkwater* v. *Combe*, 2 Sim. & Stu. 340. A sketch of the provisions of

As to a tenant for life paying the expense of an inclosure.

BY TENANT FOR LIFE, UNDER AN INCLOSURE ACT.

sioners], of &c., (two commissioners named in and appointed by an act of Parliament made and passed in the ——

the general inclosure act, and a notice of some of the points decided on the construction and effect of inclosure acts in general, may be useful.

General Inclosure Act, 41 Geo. 3, c, 109.

Sections 1 and 2 of the general act relate merely to the oath of the commissioners, &c.; and the disqualification to purchase lands in the parish for five years.

Sect. 3, empowers commissioners to fix parochial boundaries, gives a right of appeal to the quarter sessions, and declares the judgment of the sessions to be final.

Sect. 4, directs the commissioners to make a survey, admeasurement, plan, and valuation of the lands to be inclosed, and of the ancient inclosed lands within the parish or manor, distinguishing each proprietor's property; which survey, &c. are to be kept by the commissioners, and all persons interested are at all reasonable times to have liberty to peruse and inspect the admeasurement and plan only, and to take copies thereof and extracts therefrom.

Sect. 5, empowers commissioners to enter lands for the purpose of making the survey.

Sect. 6, requires claimants to allotments within the time prescribed by the commissioners to deliver a schedule of the lands in respect of which they claim, describing them, and naming the person in actual possession, and their computed quantities; stating also the rights, estates, and interests of the claimants, and distinguishing the freehold from the copyhold or leasehold; in default of which they are to be excluded from all title to allotments. The claims are before the award to be open to the inspection of parties interested, and any objections made thereto must be presented at a meeting appointed for the purpose.

This section has been held not to be confined to persons entitled to commonable rights, but to extend to an owner of tithes, and who therefore forfeited his title to an allotment, by his neglect to present his claim at the meetings held by the commissioners for the purpose of receiving claims. *Doe* d. *Watson* v. *Jefferson*, 9 B. Moo. 260; *S. C.* 2 Bing. 118. But see *post*, p. 292.

Sect. 7. Commissioners not authorized to determine disputes touching the right or title to any lands, but to set out the allotments to the persons in actual possession of the lands, in lieu or right whereof the allotments shall be made; and no suit touching such title to delay the division or inclosure.

Sects. 8, 9, and 10, relate to the disposition of roads; the hearing of objections; the stopping up of old roads; the preventing persons from erecting gates across a road, or planting trees on the sides, at less than fifty yards; the appointment of surveyors, and the levying of rates. *See*

year of his late Majesty King George the Fourth, and hereinafter in part recited), of the second part; and [*purchas-*

BY TENANT FOR LIFE, UNDER AN INCLOSURE ACT.

Harber v. *Rand*, 9 Price, 58; *Logan* v. *Burton*, 5 B. & C. 513; *S. C.* 8 Dowl. & Ryl. 299.

Stat. 41 Geo. 3, c. 109.

Sect. 11, declares, that, after the setting out and making of the roads, the grass and herbage arising therefrom shall belong to the proprietors of the adjoining lands*, and all roads, ways, and paths not set out to be extinguished, but turnpike roads not to be altered without the consent of the trustees.

Vide The King v. *Commissioners of Dean Inclosure*, 2 M. & S. 82. *An allottee may stop up a private right of way not noticed or set out in the award, without any express authority from the commissioners, though no other road is appointed in lieu of it. White* v. *Reeves*, 2 Moore, 23. *See also Pick* v. *Clarkson*, 2 Sir W. Blackstone, 1318.

Sect. 12, directs commissioners in making allotments to pay regard to the situation and convenience of the houses or homesteads of the proprietors.

Sect. 13, enables them, on the application of parties, to lay together small allotments to be stocked and depastured by the proprietors in common.

Sect. 14, declares that the several shares, when allotted, shall be in full satisfaction of all previous rights in the allotted lands; and immediately after the making of the allotments and the execution of the award, or from some other time, to be ascertained by a notice fixed on the church door, all rights of common, &c., shall be extinguished.

Sect. 15, empowers the commissioners to allot *any* hereditaments within the parish, in exchange for other lands within the parish or any adjoining parish, such exchanges to be made with the consent of the proprietors, or of the husbands, guardians, trustees, committees, or attornies of such of them as are under coverture, or under any other incapacity, or absent beyond the seas. Exchanges to be specified in the award, and where made of church lands to be with the consent of the bishop of the diocese, and the patron.

* As to the general rule of law with respect to the proprietorship of strips of land adjoining the road side, *vide ante*, Vol. 7, p. 437. It seems that the presumption, that they belong to the owners of the adjoining lands, is excluded, or at least is considerably weakened, where the narrow piece is contiguous to or communicates with open common or larger portions of land, for the evidence of ownership which applies to the larger portions applies also to the strip which communicates with them. *Grose* v. *West*, 7 Taunt. 39. Evidence of acts of ownership exercised by the lord over other slips of land similarly situated within the manor, is admissible in support of his claim. *Doe* d. *Barrett* v. *Kemp*, 5 Moore & Payne, 173.

Recital of seisin and will,

er], of &c., of the third part. WHEREAS [*testator*], late of ——, being seised to him and his heirs according to the

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Stat. 41 Geo. 3, c. 109.

Sect. 16, enables commissioners to make partition between joint tenants and tenants in common, upon the request in writing of them, or any or either of them, or of the husbands, guardians, trustees, committees, or attornies of such as were under coverture or any other incapacity, or absent beyond the seas, and to allot to them in severalty.

Sect. 17, allows two calendar months for the proprietors to accept their allotments; in case of neglect or refusal, their rights to the allotments to be forfeited.

Sect. 18, enables guardians, husbands, trustees, committees, and attornies of incapacitated persons, and tenants for life, &c., to accept allotments; and, in case of non-acceptance, allows twelve calendar months for acceptance, after incapacities removed.

Sect. 19, allows allotments to be ditched and fenced off before the execution of the award.

Sect. 20, relates to trees, &c., growing on allotments.

Sects. 21, 22, 23, provide for those cases where money is to be paid for the purchase or exchange of any land, &c., under the provisions of the general or particular inclosure act; which money ought to be laid out in other purchases, to be settled to the same uses. A proportion of the expenses of the act is first to be deducted by the commissioners, and the surplus, if amounting to 200*l.*, to be laid out in land, and, in the meantime, paid into the bank, under the direction of the Court of Chancery; if less than 200*l.*, and more than 20*l.*, to be paid into the bank, or to two trustees, at the option of the person entitled to the rents of the lands, &c.; if less than 20*l.*, to be paid to the person entitled to the rents.

Sect. 24, provides, that, in case of neglect or refusal to accept allotments, the commissioners may fence and let such allotments, and receive rents, till payment of the proportion of the expenses of the act, or charge such expenses upon the proprietors.

Sects. 25, 26, 27, 28, relate to the erection and maintenance of fences.

Sect. 29 authorizes the commissioners, in case proprietors shall not contribute their proportion of the expenses of the act, to levy the amount by distress and entry, on the allotment and perception of rent.

This power may be exercised although the commissioners have not passed their accounts before a Justice of the Peace, as usually injoined by the local act. Doe d. *Harris* v. *Bodenham,* 9 Barn. & Cress. 495; *Smith* v. *Jones,* 1 Barn. & Ad. 328; *and it applies, notwithstanding that the local act has directed part of the expenses to be raised by the sale of a portion of the lands to be allotted, leaving the deficiency only to be raised by a rate on the proprietors. Doe* v. *Bodenham,* 9 B. & C. 495.

custom of the manor of ——, in the county of ——, of sundry capital and other customary messuages, cottages, lands,

BY TENANT FOR LIFE, UNDER AN INCLOSURE ACT.

Sect. 30, enables particular tenants to charge allotments with their expenses under the inclosure. *Vide ante*, Vol. 6, p. 98. Stat. 41 Geo. 3, c. 109.

Sect. 31, enables the commissioners to deduct from the allotments to feoffees of charity or school lands, so much lands as, in the judgment of the commissioners, is equal to their proportion of the expenses of the inclosure, and to award the same to persons undertaking to defray such expenses.

Sect. 32, prescribes the mode of selling allotments for payment of expenses, where any inclosure act should direct a sale to be made for such purpose.

Sects. 33, 34, relate to the means of enforcing the attendance of witnesses to give evidence.

Sect. 35, requires the award to be engrossed or written on parchment, and read and executed at a special general meeting convened for the purpose, and to be proclaimed on the next Sunday, in the parish church; after which, it is declared to be complete. It is afterwards to be enrolled in one of the Courts at Westminster, or with the clerk of the peace for the county, that recourse may be had thereto by persons interested; one shilling only to be paid for inspection or perusal, and twopence *per* folio for a copy of any part; the copy of the award, or of any part of it, signed by the proper officer, to be admitted as legal evidence. Commissioners may annex to their award a map or plan.

Sects. 36, 37, relate to the mode of keeping the commissioners' accounts, and to the deposit of monies in their hands.

Sect. 38, enables the rector or vicar of the parish, with the consent of the bishop and patron, to lease the allotment for twenty-one years; to commence within twelve months after the executing the award, so that there be reserved to the rector or vicar the best rent without fine, and so that no lessee be made dispunishable of waste; and that, in every such lease, a power of re-entry be inserted, in case of non-payment of rent; and a counterpart be executed by the lessee. *Vide stat.* 1 & 2 Geo. 4, c. 23, *post*, p. 296.

Sect. 39, relates to the recovery and application of penalties.

Sects. 40, 41, save the rights of lords of manors, and all other rights except the rights intended to be barred or extinguished.

Sects. 42, 43, empower justices to take affidavits, and declare persons forswearing themselves guilty of perjury.

Sect. 44, provides, that the directions in this act shall be only so far binding as any of them shall not be otherwise enacted in any future act.

The schedule of the act contains the forms of affidavits, of notices, consents, allegations, and admeasurements.

BY TENANT FOR LIFE, UNDER AN INCLOSURE ACT.

tenements, and hereditaments, situate and being within and held of the said manor, and having surrendered the same to

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The object of the General Inclosure Act was to simplify and shorten local acts, by creating general provisions applicable to all ordinary cases. The local acts, however, are frequently framed so as to be complete in themselves, without having recourse to the general act, even where they do not materially vary the enactments.

Question as to the power of two surviving commissioners.

Where three commissioners are appointed, the acts of two surviving commissioners alone, without any new appointment in the room of a deceased commissioner, under a power to that effect in the act, have been held to be invalid, notwithstanding a provision in the act that all acts, matters, and things, done by any two of the commissioners should be good; for though the act thus rendered two a quorum, it required the co-existence of three commissioners at the time. *Doe* d. *Nicholson* v. *Middleton*, 6 Moore, 532. (Compare this case with *Doe* d. *Read* v. *Godwin*, 1 Dowl. & Ryl. 259).

Commissioners must pursue their authority.

Commissioners must strictly pursue their authority. If they manifestly violate the directions of the act from which that authority is derived, their award, in such particular at least, will be inoperative. Thus, where the commissioners of an inclosure act were empowered to fix the boundaries of a parish, and were to cause the boundaries so fixed to be inserted in a newspaper, and described in the award, and which were then declared to be final, a variation being discovered to exist between the boundaries advertised in the newspaper and those mentioned in the award, it was held, that the award was not conclusive as to the boundaries. *Rex* v. *Washbrook*, 4 Barn. & Cress. 732; *S. C.* 7 Dowl. & Ryl. 221.

As to the allotment to the lord.

Inclosure acts usually direct some share, often one-sixteenth in value, of the waste to be allotted to the lord of the manor; and it has been decided, that, to entitle him to this allotment, it is not necessary that he should adduce evidence of the existence of the manor; for it is considered as made in right of the soil, of which, in this instance, the claimant was admitted to be owner. *Smith* v. *Smith*, 2 Price, 101.

Deficiency of quantity no evidence of deficiency in value.

Where commissioners of inclosure are directed to allot a certain aliquot share, *in value*, of the wastes to the lord or the owner of tithes or of any other right or interest, the insufficiency of the allotment is not shewn by the fact that it contains less than the specified proportion, as the deficiency in quantity may have been compensated by superiority in value. It should seem, however, that it is not, in general, open to parties to call in question the adequacy of an allotment, and on that ground to set up a right, in compensation for which the allotment was professed to be made, that being a matter confided, unreservedly, to the judgment

the use of his will, duly made and published his last will and testament in writing, bearing date the —— day of ——, BY TENANT FOR LIFE, UNDER AN INCLOSURE ACT.

and discretion of the commissioners; though, if they have made not merely a defective allotment, but no allotment whatever in satisfaction of a right recognised by the act, the case is different; the right then remains unextinguished. Thus, where, under an inclosure act, which provided that two-fifteenths in value (quantity, quality, and situation considered), of the titheable grounds should be allotted to the rector of A. in lieu of tithes; and it was declared, that, after the enrolment of the award, all tithes should cease: the commissioners awarded certain lands to the rector in lieu of the tithes in two townships, but made no mention whatever of a third township, over which the rectory extended, and the tithes in which were now claimed by the rector, on the ground of the insufficiency of the allotment, the quantity being less than the two-fifteenths of the lands in the three townships, and the award not expressing the allotment to be made in lieu of the tithes of the third township; and as to which, therefore, it was contended there was no award, and, by necessary consequence, no extinguishment of the tithes. Sir *T. Plumer*, M. R., held, first, that the deficiency of quantity was no evidence of inadequacy in value, as the commissioners were directed to take into their consideration quality and situation as well as quantity; secondly, that though on the face of the award there was no reference to the tithes in the third township, yet that it could not be said that no regard was had to that township, for an allotment was expressly made of a piece of land there; and, thirdly, that even if an omission of a proper allotment had been proved, yet the act rendered the award conclusive. "The commissioners," the Master of the Rolls observed, "are directed to allot to different individuals, and, having finished the allotments, to draw up their award, which is an instrument recording their judgments antecedently pronounced good or bad; if the instrument contains that, it is the award; on the enrolment of that instrument the tithes cease. Is not this the award? and has it not been enrolled? The vice of the argument consists in the assumption, that because error can be proved in an allotment there is no award. The act intending to terminate all litigation, to define interests, and to extinguish rights to common and to tithes, on that event, directly puts an end to the claim to tithes. *It is quite clear, that, whatever error there might be in the previous allotments, the existence of the award concludes the question.*" *Cooper* v. *Thorpe*, 1 Swanston, 92; *S. C.* 1 Wils. 55. Against his Honour's decree an appeal was made to the Lord Chancellor, who directed an action to be brought in the King's Bench; when that Court came to a different conclusion from the Master of the Rolls, being of opinion that the rector was still entitled to his

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and thereby gave all his estates, wheresoever situate or being, to his cousin [*tenant for life*], his heirs and assigns, for

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tithes in that township for which no allotment was made in the award; for an allotment being expressly made in lieu of the tithes in two townships and not in the third, the rule *expressio unius est exclusio alterius* applied. Upon these grounds the Court was of opinion that the rector came within the saving clause of the act (which, it was observed, had not been brought to the attention of the Master of the Rolls), which saved the rights of all persons, except those to whom any allotment or compensation should be made by virtue of the act. *Cooper* v. *Walker*, 4 Barn. & Cress. 36; *S. C.* 6 Dowl. & Ryl. 31. A writ of error was afterwards brought in the Exchequer Chamber, when the judgment of the Court of King's Bench was affirmed by the unanimous opinion of all the judges. *Thorpe* v. *Cooper*, 2 Moore & Payne, 248; *S. C.* 2 You. & Jerv. 445.

Saving clause rejected for repugnancy.

Too much importance, however, must not be attached to the saving clauses in such acts; for if the saving clause be repugnant to, and would destroy the effect of, a prior enacting clause, it will be rejected; and, therefore, where in an inclosure act it was directed that certain allotments, which the commissioners were authorized to sell in order to defray expenses, should be enjoyed free from tithes, and the act contained a clause reserving the rights of all persons other than the lord of the manor and persons entitled to a right of common, it was held that the tithe-owner was deprived of his tithes in the allotments in question. The Chief Baron (*Macdonald*) observed, that the case fell within the general rule, that a saving repugnant to a proviso of the instrument is void. *Riddell* v. *White*, 1 Anstruther, 281.

Clause restrained by the context.

Indeed, clauses or expressions in any part of the act will be restrained to a consistency with the context, in deference to the evident design of the legislature, though, considered *per se*, they might seem to be susceptible of a wider construction; and therefore, where it was enacted that the commissioners should allot, for the benefit of such persons as they should determine to be entitled to a right of common therein, a certain commonable place, and which should for ever thereafter be used and enjoyed as a common pasture by the persons so determined to be entitled to the right of common thereon, *exclusive of all others whatsoever;* it was held, that, notwithstanding the generality of these words, the allottees took the common subject to the lord's right to dig stone, as the clause in question referred solely to the commissioners' power of adjudication among the commoners, and was not intended to exclude the manorial rights of the lord. *Place* v. *Jackson*, 4 Dowl. & Ryl. 318.

As to an allot-

If an allotment is warranted by the act which directs the inclosure,

ever: And whereas the said testator duly made and published a codicil to his said will, bearing date the —— day —of codicil.

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it is no objection to its validity, that it is made to persons to whom the inheritance could not have been conveyed by an ordinary conveyance, being a fluctuating body having no corporate character. And therefore, where commissioners were empowered to allot parcels of land for digging stone for the repairs of the public roads, and it was declared that the herbage of the parcels so set out should remain to the use of such persons as the commissioners should appoint, and the commissioners allotted certain parcels for this purpose, and awarded the herbage of the allotment *to the surveyors of the highways and their successors for the time being*, to be let and disposed of in aid of the highway-tax. It was contended, that the allotment to the surveyors and their successors was void in law, they not being a corporation, and therefore incapable of taking by way of grant by that description in perpetuity: but the Court held, that the objection was untenable, Lord *Ellenborough*, C. J., said—"If the act itself had directed the herbage to be taken by the surveyors of the highways for the time being, would it not have been binding upon all persons? And this is the same in effect; for the act empowers the commissioners to do that which itself might have done. The surveyors for the time being do not take by way of grant, but by way of parliamentary declaration, designating the persons who are to take and enjoy the herbage. By analogy to a common law conveyance, the objection would be good; but here they claim under the act. That which has been done through the instrumentality of the arbitrators, is the same as if directed specifically by the act; as if the award had been set out in the act. If they have allotted the herbage only, the lord of the manor in whom the fee of the soil is, will be a trustee for the surveyors for the time being as to the herbage." *Johnson* v. *Hodgson*, 8 East, 38. ment made to a fluctuating body of persons.

Where commissioners are empowered to investigate and determine any rights or claims, their award is, in that respect, final and conclusive; *à fortiori*, if the act contains, as it commonly does, an express declaration that the award shall be final, subject to a right of appeal, restricted to a certain period, after the expiration of which it is clear that an objection cannot be entertained. As to the award being conclusive.

Thus, where the commissioners were authorized to inclose and divide lands, and were directed to allot one-twentieth of the waste to the bailiff, assistants, and commonalty of G., as lords of the manor, and they were also empowered to leave certain commons uninclosed, and to define the commonable rights of the proprietors in them; and it was declared, that

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of ——, and did thereby revoke the devise in his said will of his real estate to the said [*tenant for life*] and his heirs,

any person dissatisfied with the determination of the commissioners might bring an action upon a feigned issue within three months, and that the determination of the commissioners touching any claim to the soil of the wastes, and to any rights in or over the lands to be divided, should otherwise be final. It was held, that it was not incumbent on a person who claimed under the award a right of common as occupier of a messuage (and to whose claim it seems to have been objected that he was not a freeman of G.) to shew any previous right, as the act made that award conclusive. It had been contended that the corporation were not privies to the act, and were not bound by it, but came within the saving-clause. The Court, however, was of opinion, that, as an allotment was made to them in satisfaction of their manorial rights, they were not only privies, but parties to, and were clearly bound by, the act. *Phillips* v. *Maile*, 7 Bing. 133.

Situation of persons who do not claim in time.

The General Act (section 6, *ante*, p. 284), extinguishes the rights of persons who do not claim allotments within the time prescribed by the commissioners; and in a late case this was held to apply to the owner of a moiety of the tithes in certain lands who allowed all the commissioners' meetings for receiving claims to expire without presenting any claim to an allotment in respect of his moiety; in consequence whereof an allotment was made to the owner of the other moiety for the *whole tithes*. It does not appear that the allottee assumed to be the owner of the entire tithes; but the commissioners, in making the allotment, conceived him to be entitled to the whole. Before the execution of the award, the other tithe-owner (or rather his grantee) brought an ejectment against the allottee for a moiety of the tithe allotment; but it was held, that the action could not be sustained, the claim being precluded by the 6th section of the General Inclosure Act. *Doe* d. *Watson* v. *Jefferson*, 9 B. Moore, 266. This is a strong decision. It may be doubted whether the legislature intended more by the provision in question than to preclude a person who was too late in his application for an allotment, from opening the inclosure, or, in other words, from carrying in his claim to the commissioners for an allotment after the expiration of the period fixed for receiving claims, which would be attended with much inconvenience. It is, however, quite another thing to say, that the enactment is a bar to a claim by one joint-proprietor against a co-proprietor, who had, by the laches of the former, improperly received an allotment in respect of the entirety of their common property. The application of the statute to such a case renders it a most summary statute of limitations. The principle of the case is extremely questionable.

Remarks upon the case of *Doe* v. *Jefferson*.

and did thereby devise the same to the said [*tenant for life*] during the term of his natural life only, with such re- BY TENANT FOR LIFE, UNDER AN INCLOSURE ACT.

At all events, it is clear that a remainder-man is not excluded by his omitting to present any claim in respect of his remainder, as the tenant in possession is the person to whom the allotment is to be made, and who, for this purpose, represents those whose estates are posterior to his own. If, therefore, an allotment is made to a tenant for life, it will, under the provision invariably inserted in inclosure acts, that the allotted lands shall be subject to the uses affecting the lands in respect of which the allotment is made, enure to the use of the remainder-man, who may recover it by ejectment, on the decease of the tenant for life, though the allotment was made to the latter in general terms, and not on behalf of the ulterior owners. Thus, where certain copyhold tenements had been granted by the Dean and Chapter of W. to A., B., and C., for the term of their lives successively, and A. was in possession under this grant, when an act was passed for inclosing certain moors and commons in the parish, which authorized the commissioners, in the usual manner, to divide the lands between the lords of the manor and the proprietors of the ancient tenements; and that, immediately after the allotment and inclosure, all right of common should cease; and the act provided that the lands to be allotted should enure to the same uses as the hereditaments in respect of which the allotment was made; though A. was then in possession of the copyhold tenements in question, yet B. made the claim to an allotment in respect of them; and the commissioners, by their award, allotted to B. and the Dean and Chapter, according to their respective interests, certain pieces of land in respect of their tenements. B. enjoyed the allotments for his life, during part of which time A. was living. After B.'s death, the present action was brought against his executors by C., the remainder-man; and it was held that he was entitled to recover. Mr. Justice *Bayley* observed—"The commissioners, by the act of Parliament, have no authority to grant estates, but a mere power to allot lands to persons having copyhold estates. They are to divide, set out, allot, and inclose the moors, commons, or waste lands, unto, for, and amongst all persons or proprietors interested therein, in respect of their said old auster or ancient tenements. They have, therefore, power only to allot to a person having an estate or interest in an ancient tenement. They had no power, therefore, to allot to B., except as a person having an interest in an estate called an auster tenement. The right of common is to be extinguished, and the commoners, in lieu thereof, are to have allotments. Each claim, therefore, must be made in respect of a particular auster tenement. If no claim be made in respect of an auster tenement, the owner of that

Remainder-man not obliged to make claim for allotment.

Death and probate of will.

mainders over as therein mentioned; AND WHEREAS the said testator, [*testator*], departed this life some time in or

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tenement may lose his rights. But if a claim be made, the allotment ought to be co-extensive with the right appurtenant to the tenement, and ought not to be made with relation to the particular interest of the claimant therein, as tenant for life or in reversion. The allotment should be in respect of the whole right. B. was the only person who made any claim in respect of the auster tenement in question, and an allotment was made to him in respect of that tenement. Now, he could not claim but in respect of the whole right appertaining to the auster tenement. He could not, at all events, by making a claim in respect of his particular interest only, acquire any interest in the allotment before his interest in the copyhold tenement accrued. The commissioners had no power to allot to any one, except in respect of an estate in possession. I will presume that B. acted honestly, and made a claim in his own name only, but for the benefit of all persons having any interest. That is the only way in which he could honestly make a claim. I take it, therefore, he did claim on behalf of all persons successively entitled to the copyhold estates, and, among others, of the lessor of the plaintiff. The latter, therefore, is not barred by the clause in the inclosure act, which requires claims to be made within a limited time." *Doe* d. *Sweeting* v. *Hillard*, 9 Barn. & Cress. 789; *S. C.* 4 Man. & Ryl. 736.

As to exchanges and partitions under inclosure acts.

In a few instances, the statutory powers conferred upon inclosure commissioners extend to purposes not immediately incidental to the division and appropriation of waste lands, which is the primary object of such acts. Of this nature are the powers to make exchanges of lands in the parish for other lands in the same or in any adjoining parish, and also to make partition between joint-tenants, tenants in common, and co-parceners. These powers are often very conveniently resorted to, where the infancy or some other incapacity of one or more of the parties interested renders it impossible to effect the object by mutual conveyances. The power to make exchanges* can of course only be exercised with the consent of both parties, or of the persons who are treated by the act as representing them, but the power to make partition is exercisable on the request of *any or either* of the parties, in analogy, it should seem, to the right which one co-proprietor has to enforce a partition against the others by a judicial process at law or in equity†.

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* See an observation as to inclosure exchanges, *ante*, Vol. 4, p. 89.

† As to partition, *vide ante*, Vol. 6, p. 529.

about the month of ——, in the year ——, without having altered or revoked his said will otherwise than by the afore-

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The duty of the commissioners in regard to powers of exchange is discretionary, as in the case of donees of such powers in a deed, and not merely ministerial, and therefore they cannot be compelled to exercise them even at the instance of all the parties, whose consent is required by the act. Thus, where the commissioners objected to make an exchange which was desired by the owner in fee of one of the estates, and the tenant for life of the other, on the ground that it would be prejudicial to the remainder-man, the Court of King's Bench refused to grant a *mandamus* to compel them. It had been contended that the words "shall and may," in the exchange clause of the local act, were imperative; but it was observed in answer, that those words were imperative only when they authorized something for the public good, as a churchwarden to make a rate, &c., but not so in a case like this. The Court would not grant a *mandamus* where a conscientious duty was left to the commissioners, and they declared they could not perform the act required. It would be subjecting the consciences of the commissioners to a *mandamus*. *Rex* v. *Flockwood Commissioners*, 2 Chit. Rep. 252. It was recently held, that where commissioners were empowered to award lands in exchange for others in an adjoining parish, and also to award lands to the purchasers of allotments, they might award lands received partly in exchange for other lands, and partly for money. *Doe* d. Lord *Suffield* v. *Preston*, 7 Barn. & Cress. 392.

Commissioners cannot be compelled to make exchanges.

Under the General Inclosure Act, the legal title of an allottee is not complete until the execution of the award; *Farrer* v. *Billing*, 2 Barn. & Ald. 171; see also *Ellis* v. *Arnison*, 5 Barn. & Ald. 52; but local acts frequently contain a clause authorizing an allottee to dispose of his allotment before; and which it seems enables him to confer a title, which a purchaser would be compelled to accept. *Kingsley* v. *Young*, 17 Ves. 468; *S. C.* 18 Ves. 207. And the objection, that the commissioners might vary the allotment, would not avail persons who purchased with knowledge of the circumstances, as this is inherent in the nature of the property. *Ibid.* But if the act do not contain a clause to the effect in question, the fact of the commissioners' award not being executed, is a valid ground for a purchaser's refusal to perform the contract. *Lowndes* v. *Bray*, Sugd. Vend. 8th ed. 316.

Legal title not in the allottee, until the execution of the award.

Where a local act directed that the commissioners, by notice, might cause all rights of common to be extinguished, and might then allot the waste land amongst the proprietors; and that the owners might fence their allotments after they had been marked, staked out, and confirmed, and before the signing of the award, and might also, within three months *be-*

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said codicil, and without having altered or revoked his said codicil, leaving the said [*tenant for life*] him surviving;

fore the execution of the award, sell and convey their interests in the allotments, the commissioners being thereby authorized to allot to the purchasers, and the latter, *after the execution of the award*, to hold the allotted lands in such manner as the vendor would have done if there had been no sale; provided that, where the allotments were copyhold, the deed should be enrolled in the court rolls of the manor, and that the purchaser should be admitted tenant thereto at the same time as the other allottees of copyhold lands, *viz.* after the execution of the award; it was held that this authority to inclose, and so to enjoy in severalty, and the power to sell and convey, might well (considering the language in which that power was given,) be enjoyed and exercised without the legal seisin of the land; and that, therefore, these provisions not sufficiently countervailing those of the general inclosure act, the legal freehold did not pass to the allottee till after the execution and proclamation of the award. *Farrer* v. *Billing*, 2 Barn. & Ald. 171.

Stamp on award.

The fact of an allotment to a purchaser being contained in the award, clearly does not subject it to an *ad valorem* stamp as an instrument of conveyance on a purchase. *Doe* d. Lord *Suffield* v. *Preston*, 7 Barn. & Cress. 392. In the late case of *Doe* d. *Dixon* v. *Willis*, 3 Moore & Payne, 24, it seems to have been considered as quite clear, that a conveyance by a trader of the lands in question, (and which also embraced his lands generally), in trust for the benefit of his creditors, passed the legal estate in a piece of ground which had been allotted to him under an inclosure act, though the award was not executed until three years afterwards, and though it is not stated that the act contained any particular provision giving to the conveyance this operation.

Stat. 1 & 2 Geo. 4, c. 23.

The inconveniences arising from the allottee not having the legal seisin in the allotment until the execution of the award, which is often deferred for a considerable period after the allotments are made, have been partly removed by stat. 1 & 2 Geo. 4, c. 23, which enables allottees who have demised allotments to distrain for rent, and also enables allottees to maintain actions for damage, and to bring an ejectment before the execution of the award. It also provides, that, where leases, granted by incumbents of livings under the general act, (*vide ante*, p. 287), shall determine before the effluxion of the term, it shall be lawful for them, with the consent of the ordinary and patron, to grant new leases for the remainder of the term, and under the same provisions as the former leases. The schedule to the act contains the form of an order to enable persons to take possession of their allotments, and cultivate or let the same, before the execution of the award.

And the said will and codicil have been since duly proved by the executor therein named, in the proper ecclesiastical

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Where an inclosure act does not, (as such acts generally do), direct that the allotted lands shall be of the same tenure as the lands in respect of which the allotment is made, the allotment will be freehold, though the lands in respect of which the allotment is made are copyhold; and the declaration usual in such acts, that the allotted lands shall be held to the same uses and for the same estates as the lands in respect of which the allotments are made, has no effect in assimilating the tenure. *Doe* d. *Lewes* v. *Davidson*, 2 Mau. & Selw. 175; *Doe* d. *Sweeting* v. *Hillard*, 9 Barn. & Cress. 789; *S. C.* 4 Man. & Ryl. 736.

As to the tenure of allotted lands.

It has been held, that, where the owner of an estate, and of the tithes arising therefrom, had a right of common appurtenant to the estate, and an allotment was made to him under an inclosure act, in lieu of such right of common, the allottee had the tithes in the allotted lands, in like manner as he had in the commonable right before the inclosure. *Steele* v. *Manns*, 5 Barn. & Ald. 22; see also 1 M'Clel. & Y. 609.

Allotment when tithe-free:

So, where the allotment is made in lieu of common appurtenant to lands, the land-tax of which has been redeemed, the lands allotted are also exempt; for, when the owner redeemed the land-tax, he redeemed it for the land and the right of common; and therefore, if, when the right of common was set out, the land-tax attached upon the allotment, the party would be paying double. *Boehm* v. *Wood*, 1 Turn. 334. Where the tenement to which the right of common is appurtenant is liable to tithes, and the manor is exempt, the allotted land will be chargeable, as it follows the tenement in respect of which it is allotted, and not the manor from which it is severed. Earl of *Carysfort* v. *Wells*, 1 M'Clel. & Y. 600.

—when free from land-tax.

Where an inclosure act reserves to a tithe-owner a rent in corn or money, in lieu of tithe, the rent will, it seems, be liable to the same rates and charges as the tithes for which it is substituted. On this ground it has been decided, that a person is liable to be rated to the poor, in respect of such a rent. The *King* v. *Boldero*, 4 Barn. & Cress. 467; *S. C.* 6 Dowl. & Ryl. 557; The *King* v. *Joddrell*, 1 Barn. & Ad. 403. See also *Lowndes* v. *Horn*, 2 W. Bl. 1252; *Rex* v. *Toms*, Doug. 401; *Rann* v. *Picking*, Cald. 196.

As to rents in lieu of tithes:

The exemption must be founded, if at all, on the special provisions of the act. Where the rent was to be free from all taxes and deductions, it was held to be exempt from poor's rate. *Mitchell* v. *Fordham*, 6 B. & C. 274, 9 D. & R. 335. But where the commissioners were directed to ascertain the *net* value of the great tithes and moduses, and to affix a fair, clear, and annual rent in lieu thereof, the rent was held not to be exempt from highway rates, as the word 'net' was used only as exclusive of the ex-

—when exempt from parochial assessments.

Of admission of tenant for life.

Court; And whereas, at a general court baron held for the said manor, on the —— day of ——, 18—, the said [*ten-*

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penses of collecting and getting in. *King* v. *Lacey*, 5 Barn. & Cress. 702; *S. C.* 8 Dowl. & Ryl. 457.

As to tithe allotments.

In assessing the poor's rate for a corn rent, allowance must be made to the rector for ecclesiastical dues, but not for the expense of providing for the duties of the incumbency; and in regard to land-tax and other imposts shared in common by the rector and occupiers of land, he ought to be placed on an equal footing with them. The *King* v. *Joddrell*, 1 Barn. & Adolph. 403.

Where commissioners *are* directed to allot *and award* lands in lieu of tithes, and such allotments are declared to be in satisfaction of the tithes, the tithes are not extinguished by the allotment set out in lieu of tithes, until the award be executed. *Ellis* v. *Arnison*, 5 Barn. & Ald. 47.

Effect of indiscriminate allotment, in respect of several lands held under different titles.

Much inconvenience has arisen from the neglect of commissioners to designate in their award the particular lands in respect of which allotments are made. The plan usually has been to make an entire allotment to each proprietor for his lands in the parish indiscriminately; the effect of which is to impose on an allottee the necessity, in deducing the title on any future sale to *any* part of the allotted lands, to shew the title to *all* the lands for which he made any claim—unless this requisition be, as it now commonly is, precluded by a special condition of sale, making the award the root of the title. *Vide ante*, Vol. 7, p. 418. This supposes that the allottee had the fee-simple in all the lands in respect of which the allotment was made, or at all events that they were subject to the same limitations, so as to devolve in the same channel. But, where this is not the case, as, if the allottee be owner in fee of Whiteacre, and tenant for life of Blackacre, and an entire allotment be made to him in respect of both those lands, a farther evil ensues; it then becomes necessary, at his death, in order to ascertain the rights of the respective owners to the several parts of the allotment, that those parts should be distinguished; and, if any of the persons entitled to either portion are under any incapacity, this cannot be effected by mutual agreement, but it is necessary to resort to a judicial proceeding. And it seems, (though the contrary has been supposed by a learned writer, who has exposed, with much force, the evils in question, *vide* Coventry on Inclosures, p. 7), that a bill in equity, for ascertaining boundaries, would lie in such a case; an instance of which is afforded in the late case of *King* v. *Moody*, 2 Sim. & Stu. 579, where A., who was entitled in fee to a manor, subject to an executory devise over, to arise at his death, having purchased certain freeholds in the parish, and also copyholds of inheritance, parcel of the manor, which were surrendered to him, and thereby became extinguished in the manor, and, consequently, subject to the

Interference of equity to apportion allotments.

ant for life] was admitted tenant of the said customary hereditaments of which the said [*testator*] died seised; *To* BY TENANT FOR LIFE, UNDER AN INCLOSURE ACT.

executory devise, erroneously conceiving himself to be seised in fee-simple of both estates, claimed of the inclosure commissioners one entire allotment for the whole, and the commissioners, acting under the same mistake, awarded certain lands to him, in lieu of both estates, describing the allotment to be in respect of lands of which he was seised in fee; the executory devise having taken effect, a bill was filed by the executory devisees, claiming such part of the allotment as was made in respect of the copyholds, and praying that a commission might issue to ascertain it, &c. It was objected, that the allotments having been described in the award as made in lieu of lands of which the allottee was seised in fee-simple, evidence was not admissible to the contrary; and also, that the question was a legal one, and therefore, that the plaintiffs should be left to their remedy at law. But Sir *J. Leach*, V. C., overruled both these objections, holding the evidence to be admissible; and that, as the plaintiffs could not recover at law any specific portion of the allotment, they might come into a Court of equity to have the portion to which they were entitled ascertained. The Court, therefore, declared the plaintiffs to be entitled to so much of the allotment professed to be made in respect of the estate in fee of A., as was actually made in respect of the copyhold lands, and referred it to the Master to apportion the allotment accordingly.

The evil which the Court was called upon to rectify in this case might have been prevented, and ought always to be prevented, by the claimant to several allotments carrying in before the commissioners a distinct claim for each property.

As to encroachments on wastes.

It frequently happens, that the owners of property adjacent to a common have, from time to time, enlarged their territory by encroachments upon the waste, which, from the negligence arising from the minuteness of the interests of the individuals interested in opposing it, has been tacitly acquiesced in, until the possession, originally wrongful, has ripened into an unimpeachable title. The right of entry, both of the lord and commoners, is barred by twenty years' possession; *Creach* v. *Wilmot*, 2 Taunt. 160; but, even after that period, the injured parties may assert their rights in a real action; so that a clear marketable title cannot ordinarily be acquired in less than sixty years after the encroachment. *Hawke* v. *Bacon*, 2 Taunt. 159. It has been held, that an inclosure made from the waste twelve or thirteen years since, and seen by the steward of the same lord, from time to time, without objection, may be presumed by the jury to have been made with the licence of the lord; and an ejectment cannot be brought against the tenant as a trespasser, without a countermand of the presumed licence. *Doe* d. *Foley* v. *Wilson*, 11 East, 56.

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hold to him and his assigns during the term of his natural life, according to the form and effect of the said codicil to the will of the said [*testator*]: And whereas, by an act of Parliament passed in the —— year of the reign of his late Majesty, King George the Fourth, intituled "[*title of act*]," it is among other things enacted, that the said [*commissioners*] should be, and they were thereby appointed commissioners for the purposes of the said act; And they were thereby required, by writing under their hands, to nominate an umpire for determining all differences, if any, between them, as therein mentioned; *And it was further enacted*, that it should be lawful for the said commissioners, and they were thereby authorized and required to divide, set out, and allot the open and common fields, and other commonable lands and grounds directed or intended to be divided, allotted, and inclosed by virtue of the said act in the manner therein specified, And after deducting certain allotments to be made thereout to the lord of the said manor, for and in lieu of his right to the soil of the wastes of the

Of inclosure act.

In some instances, inclosure commissioners are authorized to treat encroachments which have been made within twenty years as part of the waste, and this power is sometimes extended to encroachments made within sixty years; though usually, in the latter case, the power is confined to calling upon the parties in possession to pay the value of the ground taken, exclusively of buildings and improvements thereon, but with an alternative power of seizure in case this claim is not satisfied. It would be well if all local acts contained a provision of this nature; but, whether they do or not, inclosure commissioners should apply themselves to the task of ascertaining what, if any, recent encroachments have been made, before they proceed to divide the common; for persons who have curtailed it in this manner cannot, it should seem, be disturbed after the inclosure is completed; as the rights, both of the lord of the manor and of the commoners, are satisfied and barred by the act, and the commissioners become *functi officio* on the execution of their award. This doctrine, however, admits of an exception in regard to cases in which the convenient execution of the act requires a prolongation of the commissioners' office. Thus, it has been held, that a rate made by commissioners for the completion of the roads four years after the execution of their award, was valid, though the act vested in them an express authority in one particular case to rectify a mistake after the execution of the award, which, it was said, shewed that, for all other purposes, the award was to be final. *Haggerstone* v. *Dugmore*, 1 Barn. & Ald. 82.

said manor, and to the impropriator for and in lieu of his tithes both great and small, arising within the said parish, *It was enacted*, that the said commissioners should set out and allot all the rest, residue, and remainder of the said open and common field, and other commonable lands and grounds, unto, for, and among all the proprietors of lands, common rights, or other hereditaments therein, for which no allotment or other compensation was thereinbefore specifically directed to be made, in such quantities, parts, shares, and proportions, as the said commissioners should adjudge and determine to be a just equivalent, compensation, and satisfaction for their said several lands, common rights, or other hereditaments, in proportion to the respective values thereof, subject to the particular directions therein contained; *And it was thereby further enacted*, that the several hereditaments which should be allotted unto and for the several proprietors, in pursuance of the said act, should be in full lieu, compensation, and satisfaction of and for all the former lands, grounds, right of common, and other rights and interests in, upon, and from or in respect of the said open and common fields, common meadows, and other commonable lands and grounds; *And it was thereby further enacted*, that it should be lawful for the said commissioners to set out and assign and allot any of the lands or grounds thereby directed to be divided or allotted, or any messuages, buildings, inclosed lands or grounds, or other hereditaments in the parish of ——, aforesaid, in lieu of and in exchange for any other messuages, buildings, lands, tenements, and hereditaments in the same parish, or in any other parish or township adjoining thereto, so as every such exchange should be made under and pursuant to the directions in the said act contained, And every such exchange so made should, as well in respect of the hereditaments within the parish aforesaid, as in respect of the hereditaments within any other parish adjoining thereto, be for ever valid and effectual in the law to all intents and purposes, notwithstanding the want of title in any of the exchanging parties, or any settlement, limitation, use, trust, or incumbrance affecting the hereditaments so exchanged, or any part thereof; *And it was* amongst other things *further enacted*, that as soon as such division and allotment of the said open and

Power to commissioners to allot open and commonable lands.

Allotments to be in lieu of right of common.

Power to make exchanges.

Commissioners to make an award.

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common fields, common meadows, wastes, and other commonable lands and grounds aforesaid, should have been completed pursuant to the directions of the said act, the commissioners should form and draw up an award or instrument in writing, according to the particular directions in the said act contained in that respect; *And it was thereby further enacted*, that the several lands and hereditaments which should be respectively allotted and exchanged by virtue of the said act, should, upon the allotment and exchange thereof, become and be of the same tenure, and be held under the same rents and services, and go and remain to the same uses and trusts, and be subject and liable to the same devises, powers, provisoes, conditions, covenants, agreements, charges, and incumbrances, as the hereditaments in respect whereof the same should be respectively allotted and exchanged, were or should be subject or liable to, in case the allotment and exchange thereof had not been made, or the said act had not passed (except as therein mentioned); *And it was further enacted*, that all the costs, charges, and expenses of soliciting and passing the said act, and of surveying, admeasuring, and valuing as well the said open and common fields, and other commonable lands and grounds thereby directed to be divided and inclosed, and of dividing and allotting the same common and open fields and other commonable lands and grounds, and of forming and making the public roads, public or common drains, sewers, watercourses, watering places for cattle, wells, bridges, and other conveniences which should be set out by virtue of the said act, and of making such exchanges as aforesaid, and of preparing and inrolling the said award, and all other the costs, charges, and expenses of the said commissioners, and of the several persons employed by them either before or after the execution of the said award, in and about or concerning the execution of the said act, and not therein otherwise directed to be paid, should be paid, borne, and defrayed by all the owners of or persons interested in, as well the said open and common fields and other commonable lands and grounds, as the lands, tenements, and hereditaments, which should be respectively exonerated from tithes, and exchanged by virtue of the said act, except as therein mentioned, in proportion as near as might be to their respective estates and in-

Allotted lands to be subject to the same uses, &c., as the lands in respect of which the allotment is made.

Expenses of the inclosure to be borne by the several owners.

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terests, (due regard being had to the expenses occasioned by each person's estate, and also to the value thereof), and that the shares and proportions of the said costs, charges, and expenses to be borne by the said respective owners and persons interested, should be settled and ascertained by the said commissioners, and should be paid to such person or persons, and at such time or times, either before or after the execution of the said award, as the said commissioners should direct or appoint; *And it was further enacted*, that it should be lawful for the said several owners and proprietors for the time being, of all or any of the lands and grounds, as well inclosed as commonable, in the said parish of ——, being tenants in tail, or for life or lives only, by indenture or indentures duly sealed and delivered, and inrolled in any of his Majesty's Courts of record at Westminster, and with the consent of the said commissioners, to be testified in writing under their respective hands and seals, either before or after they should have made their award, to sell and convey to any person or persons whomsoever, such part or parts of any old inclosures belonging to such owner or proprietors respectively, or such part or parts of any new allotment or allotments, to be assigned or allotted to them respectively, by virtue of the said act, as should be eligible, sufficient, and necessary for the purpose of defraying and paying the respective proportions of the charges and expenses of obtaining and passing the said act, and other necessary charges incident to and attending such inclosure and division, and the execution of the other powers contained in the said act, and also the charges of such sale, and all other necessary expenses attending the same, to be ascertained by the said commissioners; And that the person or persons to whom any such old inclosures, or new allotment or allotments, or any part or parcel thereof respectively, should be sold and conveyed as aforesaid; and all persons claiming under them, should and might have, hold, possess, and enjoy the same respectively, peaceably, and quietly, according to the terms of the sale and conveyance thereof, without any interruption from the person or persons to whom any such old inclosures for the time being should belong, or to whom any such allotment or allotments should be made in and by the said award, or from any person or persons whomsoever

Power to tenants in tail and for life, with the consent of commissioners, to sell and convey,

—for the purpose of defraying expenses.

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claiming under them or any of them, any settlement, will, use, trust, remainder, limitation, or other impediment or incumbrance to the contrary notwithstanding. *And it was thereby provided and enacted*, that no such sale, conveyance, or grant of any old inclosure or new allotments as aforesaid, which should be made by virtue and in pursuance of the said act, should be valid and effectual unless the said commissioners should certify their consent thereto and approbation thereof, by signing and sealing the same as parties thereto; *And further*, that, in cases where any messuages, lands, tenements, and hereditaments might be sold in pursuance of the said act as aforesaid, it should be lawful to sell the same, either by public auction or private contract, provided that, in case of sale by private contract, the said commissioners should be satisfied that the price agreed to be given for the same was not less than the actual value thereof, according to any estimate made or directed to be made by them, and verified by oath, which any one of the commissioners was thereby empowered to administer. *And it was thereby also provided*, that, when they the said commissioners should judge necessary to direct any such sale by public auction, in pursuance of the said act, it should not be necessary to require any such estimate as was thereby required in cases of sale by private contract. AND WHEREAS, by an award in writing under the hands and seals of the said [*commissioners*], the commissioners named in the said in part recited act, And also of [*umpire*], the umpire by them appointed, and by them made in pursuance of the said act, by indenture bearing date the —— day of ——, and inrolled in the Court of Chancery within the time limited by the said act, the said [*commissioners*] and [*umpire*] did, amongst other things, declare that they had set out and allotted, and they did thereby award unto the devisees of the said [*testator*], as an exchange, equivalent, compensation, and satisfaction for and in lieu of a certain garden and parcel of land therein mentioned to be thereby exchanged, and therein awarded to [A. B.]; And also, in lieu of all the copyhold lands, common fields, and common meadow land, and right of common belonging to the copyhold messuages and lands of the said [*testator*], (amongst other allotments), All those two several allotments, pieces, or parcels of copyhold land hereinaf-

Commissioners to be parties to conveyances.

Mode of sale.

Commissioners' award.

ter particularly described, and intended to be hereby conveyed and assured (*b*). And whereas the said [*tenant for life*] hath paid and expended divers sums of money in defraying his proportion of the charges and expenses of obtaining and passing the said act, and other necessary charges incident to and attending such inclosure and division, and execution of the other powers contained in the said act, and which said several sums amount, in the whole, to the sum of £——. And whereas a true and correct statement of the several sums so expended by the said [*tenant for life*] hath been exhibited and laid before the said [*commissioners*], the commissioners named in and appointed by the said act, who have duly examined into the same, and have had the several payments duly vouched before them; and they the said commissioners have ascertained the said sum of £—— to be a fair and reasonable claim, and ought to be allowed to the said [*tenant for life*]; And they the said commissioners do hereby allow of the same accordingly. And whereas the said [*tenant for life*] being desirous of availing himself of the provisions for that purpose contained in the said recited act, hath applied to the said [*commissioners*], the commissioners named in the said act, for their consent to a sale and conveyance of such parts of the said allotments so assigned and allotted to the devisees of the said [*testator*], as aforesaid, or of any old inclosures belonging to them, as shall be ascertained by the said commissioners to be eligible, sufficient, and necessary for paying and defraying the said sum of £—— so by him the said [*tenant for life*] expended as aforesaid, and also the charges of such sale, and all other necessary expenses attending the same; And, in consequence of such application, they the said commissioners have selected and directed the allotments, pieces, and parcels of ground hereinafter mentioned and described, and intended to be hereby conveyed and assured, (being part of the hereditaments so assigned and allotted to the devisees of the said [*testator*] as aforesaid), to be sold and conveyed for the pur-

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Of payment of expenses by tenant for life.

Of allowance by commissioners.

Of application by tenant for life to commissioner to select allotments for sale, to pay the expenses of the inclosure.

(*b*) The purchaser ought to be furnished with an authenticated extract from the award, and a copy of the act of Parliament by virtue of which the inclosure is made. Much useful information respecting evidence of title will be found in Coventry's Conv. Evid., just published.

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poses aforesaid, together with other hereditaments, by public auction, for the best price or prices that could be had or gotten for the same. AND WHEREAS, in pursuance of such direction of the said commissioners, the allotments, pieces, or parcels of ground hereinafter mentioned and described, were, together with other hereditaments, put up to sale by public auction by Mr. ——, at the ——, on the ——, pursuant to public advertisements and printed particulars and conditions, published previously to such sale; at which sale the said [*purchaser*] attended, and, being the highest bidder for, was declared and allowed to be the purchaser of the allotments, pieces, or parcels of land and hereditaments hereinafter mentioned and described, and intended to be hereby conveyed and assured, (being lots two and three in the aforesaid particulars of sale), at or for the price or sum of £——.

Of sale by auction, and purchase.

Of amount of expenses.

AND WHEREAS the proportion of the said [*tenant for life*] of the charges of the aforesaid sale, and the other necessary expenses attending the same, have been ascertained by the said commissioners to amount to the sum of £——. AND WHEREAS the said purchase-money, or sum of £——, and also the said sum of £——, at which a certain old inclosure in the said parish of ——, which devolved to the said [*tenant for life*], during his life, under and by virtue of the said recited will and codicil, was sold and conveyed to [R. S.], by and with the consent of the said commissioners, and making together the sum of £——, do not exceed the said two sums of £—— and £——, being the amount of the allowed proportion of him the said [*tenant for life*] of the charges and expenses of obtaining and passing the said act, and other necessary charges incident to and attending such inclosure and division, and the execution of the other powers contained in the said act, and also the charges of such sale, and all other necessary expenses attending the same, as aforesaid.

That purchase-money does not exceed the expenses.

Testatum.

NOW THIS INDENTURE WITNESSETH, that, for completing the said purchase of him the said [*purchaser*], so made as aforesaid, and in consideration of the sum of £—— of lawful money of Great Britain and Ireland to the said [*tenant for life*], at or before the sealing and delivery of these presents paid by the said [*purchaser*], by the direction and appointment of the said [*commissioners*], the commissioners appointed by the said in part recited act as afore-

In consideration of purchase-money paid to tenant for life, he, with consent of commissioners, conveys to purchaser.

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said, (testified by their severally signing and sealing these presents), the receipt of which said sum of £—— the said [*tenant for life*] doth hereby acknowledge, and from the same doth acquit and discharge the said [*purchaser*], his heirs, executors, administrators, and assigns, for ever, by these presents, He the said [*tenant for life*], pursuant to the power and authority in him vested, or to him given, in and by the said hereinbefore in part recited act, and by and with the consent, concurrence, and approbation of the said commissioners, (testified as aforesaid), *Hath* granted, bargained, sold, and conveyed, And by this present indenture by him the said [*tenant for life*] duly sealed and delivered, and intended to be inrolled pursuant to the direction of the said in part recited act, *Doth* grant, bargain, sell, and convey unto the said [*purchaser*], his heirs and assigns, ALL &c. *(parcels)*, and all houses, &c., and the reversion (*c*), &c.: TO HAVE AND TO HOLD the said closes, pieces, or parcels of land, and all and singular other the premises hereby sold and conveyed as aforesaid, or expressed and intended so to be, with the appurtenances, unto the said [*purchaser*], his heirs and assigns, for ever, TO THE ONLY USE and behoof of the said [*purchaser*], his heirs and assigns, for ever, and to and for no other use, intent, or purpose whatsoever. *(Covenant by tenant for life that he has not incumbered, and for further assurance).* IN WITNESS, &c. (*d*).

Premises.

Habendum.

Covenant that tenant for life hath not incumbered.

(*c*) As the conveyance is made under a statutory power, the estate clause, which was inserted in the draft from which this precedent was taken, seems to be quite as inapplicable, as it is in the case of an appointment under a power created by the act of the party. In this respect, the present precedent differs from the last, where the fee, and not merely a power over it, being vested in the persons empowered to sell, the clause was proper.

Opinion accompanying the draft.

(*d*) This draft was settled by a gentleman of eminence now deceased. He wrote upon it as follows:—

"Upon the construction of the clause in the act, empowering a sale for defraying the expenses of the inclosure, a doubt may possibly arise whether it extends to the copyhold allotments, that tenure not having been expressly mentioned in the clause in question. But, taking it for granted that the copyhold allotments are comprised in the clause mentioned, (and I conceive that they are), then, clearly, this present conveyance by

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bargain and sale is a sufficient execution of the power of sale in the act, *without any surrender*. But it will be necessary that the purchaser should be admitted, and pay his fine for such admission to the lord."

Remark as to the *ad valorem* stamp duty.

As the present deed supersedes the necessity of a surrender, it must bear the *ad valorem* duty, which would otherwise have been placed on the latter. *Vide ante*, p. 200.

The precedent in the text might easily be adapted to a conveyance by a tenant for life under the power of sale contained in the land-tax redemption act, 42 Geo. 3, c. 116, ss. 51, 54, stated *ante*, Vol. 3, pp. 404, 406, 2nd edition, or under any other statutory power.

CONTINGENT SHARE UNDER A WILL.

DEED *of* CONVEYANCE *on a Sale by a Contingent Remainder-man in Fee* (*a*).

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the one part; and [*purchaser*],

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Remarks on the precedent in the text.

(*a*) In this case the devise is supposed to have been to A. for life, with remainder in fee to such of her children as should be living at her death, and the vendor, being one of the children of A., contracts for the sale of his contingent share in his mother's life-time. The precedent assumes two propositions: *first*, that such an interest is transferable by indenture alone without a fine, and though the assurance is not by demise; and *secondly*, that the grantor's want of a present estate ought not to be disclosed on the face of the deed, both which have been the subject of discussion in antecedent parts of the present work. *Vide ante*, p. 54; also, Vol. 4, p. 160, 2nd ed. The former doctrine may be considered as pretty well established; but the latter, resting solely on the authority of a case that has not been recognised of late years, is more open to doubt. If, on this account, the practitioner thinks that he may safely disregard it, the covenants contained in the following precedent, which are inserted in a separate deed in order to avoid disclosing the exact state of the title on the face of the conveyance, may be incorporated in the latter. A purchaser of a contingent interest of this kind is exposed to the risk of the expectant share wholly failing in event by the death of the vendor in the life-time of his mother, or being diminished by her having other children; though, on the other hand, it is liable to accretion by the diminution in the

of &c., of the other part; WITNESSETH, that, in consideration *(of a sum paid by the purchaser to the vendor, the receipt*

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number of the existing children by death: to these risks must be added, unless the contingent remainder be preceded by a limitation to trustees to preserve in the usual manner, that of its being destroyed by the tenant for life. In relation to this it may be observed, that, where a contingent remainder-man sells and aliens his interest, and the remainder (not being protected by the usual limitation to trustees) is subsequently destroyed by the act of the tenant for life, and the vendor afterwards obtains an interest in the estate thus tortiously acquired, he will be bound to make good his conveyance out of the latter interest, so far as it will extend. This point was decided in the late case of *Noel* v. *Bewley*, 3 Sim. 83, the facts of which were as follow:—In 1711, a mortgage for a term of years was made to A.; and in 1712, a mortgage in fee was made of the same estate to S. in trust for A. In 1714, the equity of redemption was conveyed to A., and the mortgage term assigned to a trustee for him, to attend the inheritance; and S. covenanted that he would stand seised in trust for A., but no reconveyance was ever executed by him. In 1782, A. devised his real estate to his daughter, B., for life, with remainder to such of her children by H. as should be living at her death. In 1802, C., the only child of B. by H., *in her life-time*, granted his contingent remainder to his bankers in trust to secure advances made and to be made to him, and covenanted for further assurance in the usual manner. In 1817, B. executed a conveyance in trust for herself, by which the contingent remainder, depending on her life estate, (unless it could be considered as an equitable limitation by reason of the legal estate outstanding in the representatives of S.), was destroyed; and immediately afterwards by will devised the property in question, in trust to pay debts and funeral expenses, and subject thereto in trust to pay two-thirds of the yearly produce to her son, C., for life. After the death of B., the bankers filed a bill against C. and the trustees of the will of B., charging, that the contingent remainder created by the will of A. was not destroyed by the act of B., inasmuch as the legal inheritance was outstanding in the representatives of S.; but, if such destruction had taken place, claiming to be declared entitled to whatever interest C. took under the will of his mother, B.; the Vice-Chancellor (Sir *L. Shadwell*) held, that a re-conveyance might be presumed of the legal estate vested in S.*; which presumption was aided by certain acts of dominion performed by A. in granting leases, &c.; and that, therefore, the contingent remainder was destroyed by the conveyance of B., the tenant for life.

Conveyance by contingent remainder-man made good out of estate acquired after the destruction of the remainder.

* On this point, *vide ante*, Vol. 6, p. 457.

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of which is acknowledged in the usual manner), he the said [*vendor*] HATH granted, bargained, sold, and confirmed, and by these presents DOTH &c., unto the said [*purchaser*] and his heirs, ALL THAT the remainder in fee-simple, expectant on the determination of the estate for life of [*tenant for life*], of ——, the mother of the said [*vendor*], and all other the estate and interest, if any, of the said [*vendor*] in and to (*b*)

He held, however, that the plaintiffs were entitled to the benefit of the interest taken by C. under his mother's will. On this point his Honour observed—"It strikes me, that any interest which C. might acquire in the estate which he professed to convey by the deed of 1802, would be operated upon by the covenant for further assurance in that deed; and therefore, inasmuch as the contingent remainder was destroyed, and in lieu of it he received a different interest in the land, he is bound, in equity, to make good his covenant. But I do not place much reliance upon the covenant for further assurance, because I take the law to be this, that, *if a person has conveyed a defective title, and he afterwards acquires a good title, this Court will make that good title available to make the conveyance effective.* The distinction between the cases cited and the present case appears to be this—that, in the former, the parties who made a conveyance for a valuable consideration, had a defective title, and were supposed to have a good one, and that that title, originally defective, was, either wholly or partly, made good by some subsequent circumstances. But, in the present case, C. actually had the title that he professed to have, and conveyed what he had and professed to have, namely, a contingent remainder. But then, it turns out, that, by the act of his mother, the contingent remainder was destroyed; and by her act he acquires an interest in the estate. I cannot, however, think that the circumstance of the party conveying what he really had can make any substantial difference as to the relief to be afforded in this Court to the grantee." If the defendant C. had taken a legal interest under the limitations in his mother's will, it should seem that the present suit would have been unnecessary, as the conveyance would have operated on that interest by way of estoppel. *Bensley* v. *Burdon*, 2 Sim. & Stu. 519, *ante*, p. 55.

As to conveyances by the presumptive members of an unascertained share.

(*b*) Where a conveyance is made by the expectant member of an unascertained class, it ought always to be so framed, unless the contrary be intended, as to comprise the entire estate, it being possible that, in event, the entirety may devolve to him as the sole object. Thus, if a devise, having been made to the children of A. living at her death, one of the sons of A., in her life-time, sells his contingent interest, the conveyance should not be confined to the expectant share, according to the existing number

ALL THAT *(describe parcels, with general words)*; And all the estate, &c., in and to the said remainder and premises. TO HAVE AND TO HOLD the said remainder, and other the premises hereby granted and confirmed, or intended so to be, unto the said [*purchaser*], his heirs and assigns, for ever; TO THE USE of the said [*purchaser*], his heirs and assigns, for ever (*c*); and to or for no other use, intent, or purpose whatsoever. IN WITNESS, &c.

CONTINGENT SHARE UNDER A WILL.

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of children, but should extend to the entirety; which, in the event of his being the only surviving child, would belong to him. The precedent in the text has been framed on this principle.

(*c*) If to uses to prevent dower, proceed *ut ante*, Vol. 7, p. 461. As a remainder, of course the property is not liable to dower; but, on the determination of the prior estate for life, it would become so.

DEED *of* COVENANTS *to accompany the last Precedent.*

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the one part; and [*purchaser*], of &c., of the other part. *(Recite seisin and will of late owner, by which all his real property was devised to the vendor's mother, for life, with remainder in fee to such of her children as should be living at her decease; the death of testator, and probate of his will, in the usual manner).* AND WHEREAS the said [*tenant for life*] is still living, and is of the age of —— years, or thereabouts; AND WHEREAS the said [*tenant for life*] hath four children, namely, the said [*vendor*], and [A. B.], [C. D.], and [E. F.]; AND WHEREAS the said [*vendor*] lately contracted with the said [*purchaser*] for the absolute sale to him of his contingent remainder in fee, expectant on the decease of the said [*tenant for life*], in the —— and hereditaments hereinafter described, at or for the price or sum of £——. AND WHEREAS, by an indenture bearing even date with these presents, made between

Parties.

Recitals.

CONTINGENT SHARE UNDER A WILL.

the said [*vendor*], of the one part, and the said [*purchaser*], of the other part, the said [*vendor*], in consideration of the said sum of £—— paid to him by the said [*purchaser*], the receipt whereof is thereby acknowledged, did grant, bargain, sell, and confirm unto the said [*purchaser*], his heirs and assigns, *All that (follow the words of the deed), To hold* the same remainder and premises unto and to the use of the said [*purchaser*], his heirs and assigns, for ever; AND WHEREAS the said [*vendor*] hath agreed with the said [*purchaser*] to enter into the covenants hereinafter contained. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and for the considerations expressed in the hereinbefore recited indenture, he the said [*vendor*], for himself, his heirs, executors, and administrators, Doth hereby covenant and agree with the said [*purchaser*], his heirs and assigns, that, notwithstanding any act, deed, matter, or thing whatsoever, made, done, occasioned, or suffered by the said [*vendor*], or by the said [*testator*], his late father, deceased, to the contrary, he the said [*vendor*], at the time of the execution of the hereinbefore recited indenture, had full power, and lawful and absolute authority, to grant, bargain, sell, and confirm unto and to the use of the said [*purchaser*], his heirs and assigns, for ever, such contingent remainder in fee-simple, expectant on the determination of the estate for life of the said [*tenant for life*], of and in the said —— hereditaments and premises, as presumptively belonged to him the said [*vendor*], as one of the children of the said [*tenant for life*], according to the tenor and effect of the hereinbefore recited devise; And also, that it shall be lawful for the said [*purchaser*], his heirs and assigns, from time to time, and at all times for ever after the decease of the said [*tenant for life*], in case the said [*vendor*] shall survive her, peaceably and quietly to hold and enjoy the said —— hereditaments and premises, or such aliquot part or share therein, as may happen to devolve or accrue to him the said [*vendor*], according to the tenor and effect of the said devise; and to receive the rents and profits thereof for his and their absolute use and benefit, without any interruption or disturbance whatsoever from or by the said [*vendor*] or his heirs, or any person or persons lawfully claiming through or under him or them, or through or under the said [*testator*], deceased; *And that* free and clear of and from all titles, charges, and incumbrances

Testatum.

Vendor covenants that, notwithstanding &c., he had power to grant.

—For quiet enjoyment.

Free from incumbrances.

CONTINGENT SHARE UNDER A WILL.

whatsoever, created or occasioned by the said [*vendor*], or by the said [*testator*], deceased, or by or through the acts, defaults, privity, or procurement of them respectively; *And lastly*, that he the said [*vendor*] and his heirs, and every person lawfully claiming through or under him or them, or through or under the said [*testator*], deceased, will from time to time, and at all times hereafter, on the request and at the costs of the said [*purchaser*], his heirs or assigns, make, do, and execute such further deeds, acts, and assurances, for the more effectually granting or otherwise assuring the said remainder and premises so contracted to be sold by the said [*vendor*] to the said [*purchaser*], and expressed to be conveyed by the said indenture bearing even date with these presents, as aforesaid, unto and to the use of the said [*purchaser*], his heirs and assigns, for ever, in the manner hereinbefore mentioned, as by the said [*purchaser*], his heirs or assigns, or his or their counsel in the law, shall be reasonably advised and required, and tendered to be executed. IN WITNESS, &c.

And for further assurance.

ASSIGNMENT *of a* BOND-DEBT.

BOND DEBT.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*vendor*], of &c., of the one part; and [*purchaser*], of &c., of the other part. WHEREAS, by a certain bond or obligation, bearing date on or about the —— day of —— last, under the hand and seal of [*obligor*], of &c., the said [*obligor*] became bound unto the said [*vendor*] in the penal sum of £——, conditioned for the payment unto the said [*vendor*], his executors or administrators, of the sum of £——, and interest thereon, at the rate of *5l. per cent. per annum*, from the day of the date thereof, on the —— day of ——, then now and next ensuing. AND WHEREAS the said principal sum of £—— remains owing to the said [*vendor*], together with interest thereon from the —— day of ——. AND WHEREAS the said [*purchaser*] hath con-

Parties.

Recital of bond;

—Of debt being due;

—Of contract for purchase.

BOND DEBT.

Testatum.

tracted with the said [*vendor*] for the absolute purchase of the said bond-debt, at the price or sum of £——. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of £—— of lawful money of Great Britain and Ireland, paid by the said [*purchaser*] to the said [*vendor*], at or immediately before the execution of these presents, the receipt whereof the said [*vendor*] doth hereby acknowledge, and from the same doth absolutely discharge the said [*vendor*], his heirs, executors, and administrators, *He* the said [*vendor*] *Hath* assigned and transferred, and by these presents *Doth*, &c., unto the said [*purchaser*], *All that* the hereinbefore recited bond or obligation, and the full and whole force, benefit, and effect thereof, and of all other securities for the said debt; And all and every sums and sum of money now due, or hereafter to become due, either for principal or interest, by virtue or in respect of the same bond or obligation; And all the right, title, interest, claim, and demand, both at law and in equity, of the said [*vendor*], in or to the same bond or obligation, and other securities and sums and sum of money respectively; TO HAVE AND RECEIVE the said bond or obligation, sums and sum of money, and other the premises hereby assigned, or intended so to be, unto the said [*purchaser*], his executors or administrators, to and for his and their own use absolutely: *And* the said [*vendor*] doth hereby absolutely and irrevocably constitute and appoint the said [*purchaser*], his executors or administrators, the true and lawful attorney and attornies of him the said [*vendor*], his executors or administrators, for him or them, and in his or their name or names, or otherwise, to receive, and, if the said [*purchaser*], his executors or administrators, shall deem it expedient so to do, to sue for and recover the said monies hereby assigned, and when the same, or any part thereof, shall be received, to give valid acquittances and discharges for the same, and generally to perform all acts whatsoever which shall be requisite, in order to give complete effect to the assignment hereby made, and to appoint a substitute or substitutes for all or any of the purposes aforesaid (*a*), and such substitution at pleasure to revoke,

In consideration of purchase-money, vendor assigns to purchaser,

Bond, &c.

All the right, &c.

Habendum.

Power of attorney.

(*a*) If the purchaser assigns the debt, he must exercise this power of substitution, *ut ante*, Vol. 6, p. 415.

BOND DEBT.

the said [*vendor*] hereby ratifying and confirming, and agreeing to ratify and confirm, whatsoever his said attorney or attornies, or his or their substitute or substitutes, shall lawfully do in the premises: And the said [*vendor*], for himself, his heirs, executors, and administrators, doth hereby covenant with the said [*purchaser*], his executors and administrators, that the said bond or obligation hereby assigned, or intended so to be, is now a good and valid bond, and of full force and virtue for the sum of £—— and interest as aforesaid: And that there is now justly owing to him the said [*vendor*], the said principal sum of £——, and interest thereon from the —— day of —— last as aforesaid, upon or by virtue of the same bond; And also, that the said [*vendor*], his executors or administrators, will not, at any time hereafter, revoke the power or authority hereinbefore contained (*b*), or receive, compound for, or discharge the said monies hereby assigned, or any part thereof, or release or interfere with any action or suit which shall or may be commenced in his, their, or either of their name or names, in pursuance of these presents, for the recovery of the same, without the consent in writing of the said [*purchaser*], his executors, administrators, or assigns; but will at all times avow, justify, and confirm all such matters and things, process and proceedings, as he the said [*purchaser*], his executors, administrators, or assigns, or any other person or persons by or through his or their direction or procurement, shall, in pursuance of the said power hereinbefore contained, do, commence, bring, or prosecute, upon or by reason or means of the said bond or obligation and premises; *And further*, that he the said [*vendor*], his executors and administrators, will, at all times hereafter, on the request and at the costs of the said [*purchaser*], his executors, administrators, or assigns, make, do, and execute all such further assignments, letters of attorney, acts, deeds, matters, and things for the more effectually assigning and assuring unto the said

Covenant by vendor.

—That bond is valid.

Not to revoke power, or receive debt:

And for further assurance.

(*b*) According to the modern decisions, this power, being coupled with an interest, would be irrevocable. *Vide ante*, Vol. 5, p. 138, 2nd ed. The suggestions (*ante*, Vol. 6, p. 136) as to the precautions proper to be taken by the mortgagee of a debt, apply for the most part to a purchaser.

BOND DEBT.

[*purchaser*], his executors, administrators, and assigns, the said recited bond or obligation, and enabling him or them to receive and recover the principal money and interest already due, and hereafter to grow due thereon, for his and their own absolute use and benefit, in manner aforesaid, according to the true intent and meaning of these presents, as by the said [*purchaser*], his executors, administrators, or assigns, or his or their counsel in the law, shall be reasonably required. And the said [*purchaser*], for himself, his heirs, executors and administrators, doth hereby covenant with the said [*vendor*], his executors and administrators, that he the said [*purchaser*], his executors, administrators, or assigns, will at all times hereafter effectually save harmless and keep indemnified the said [*vendor*], his executors and administrators, from and against all losses, costs, charges, damages, and expenses whatsoever, by reason of his or their name or names being used in any action, suit, or other proceeding which shall or may be brought or instituted by the said [*purchaser*], his executors or administrators, or his or their substitute or substitutes, under or by virtue of the power or authority in that behalf hereinbefore contained, or otherwise, by reason or in consequence of the same power or authority, or in relation thereunto (*c*). IN WITNESS, &c.

Covenant by purchaser to indemnify vendor, by reason of his name being used in any action.

As to the stamp duty attaching under the circumstances of the precedent.

(*c*) It is conceived that this deed would be liable only to a common deed stamp, without regard to the amount of the consideration-money, as it seems to fall within the reasoning of the Court of King's Bench in the case of *Warren* v. *Howe*, 3 Dowl. & Ryl. 494; *S. C.* 2 Barn. & Cres. 283, (see also *Belcher* v. *Sikes*, 6 Barn. & Cres. 234, stated *ante*, Vol. 6, p. 308), in which it was decided, that an assignment of a judgment debt was not liable to an *ad valorem* stamp. The Lord Chief Justice observed—"The words (of the stamp act) are 'conveyance of any right, title, interest, or claim to any lands, tenements, rents, annuities, *or other property*,' for or in respect of the deed, whereby the lands or other things sold shall be conveyed to the purchaser. The statute enumerates things which are the subject of sale, and which are usually converted into money; and I think that the expression 'other property' *applies only to property of the same description as that previously mentioned, viz. such property as is usually the subject of sale, and may be converted into money.* Now, a judgment debt is not a property of that description." His Lordship added, "it clearly does not fall within the other clause which has been adverted to (which was the clause imposing the duty on mortgages), because it is not a conveyance

of property in trust for sale." The last observation of the noble Judge is singular, because the purpose of the deed, though not a trust for sale, was to secure a sum of money owing from the assignor to the assignee, with an ultimate trust, after the satisfaction of that debt, for the assignor; so that it was, to all intents and purposes, a mortgage. The error (for such I must take the liberty to consider it), however, is unimportant, as the words of the two clauses are not, in regard to this point, materially different. BOND DEBT.

ASSIGNMENT *of a* POLICY *of Life* ASSURANCE *by a* VENDOR *to a* PURCHASER. *(A concise Form (a).*

POLICY OF LIFE ASSURANCE.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*vendor*], of &c., of the one part; and [*purchas-* Parties.

(*a*) See a longer form of an assignment of a policy of life assurance, *ante*, Vol. 6, p. 139.

Some observations have been already made on sales of policies of life assurance, *ante*, Vol. 7, p. 448, to which should now be added a notice of the case since reported of *Ashley* v. *Ashley*, 3 Sim. 149, which has decided, that a good title may be made to a policy effected on the life of the assured himself to a purchaser for valuable consideration, although it may have passed intermediately through the hands of an assignee for a nominal consideration. The case was as follows:—In 1802, William Heath insured his life, in the Equitable Insurance Office, for 1000*l.* By a deed poll, dated the 10th of March, 1810, Heath, in consideration of 5*s.*, and for divers other considerations him thereunto moving, assigned the policy to James Hodsoll. In October, 1810, Hodsoll died. In February, 1815, a decree was made in a suit instituted by Heath and others, against Hodsoll's executors, under which the policy was sold to General Ashley for 320*l.*: and, in August of the same year, the executors assigned the policy to General Ashley. In August, 1817, General Ashley died. In 1829, the policy was sold to Farebrother, under the decree in a cause instituted by General Ashley's widow against his executors. The purchaser objected to the title on the ground of the want of interest in Hodsoll the assignee; but the objection was overruled by the Vice-Chancellor, Sir *L. Shadwell*, who, after reading the three first sections of the statute 14 As to titles to policies of life insurance.

POLICY OF LIFE ASSURANCE.

Recital of policy.

Contract for purchase.

Testatum.

er], of &c., of the other part: WHEREAS, by a policy of assurance bearing date on or about the —— day of ——, under the hands and seals of three of the directors of the —— insurance company, and numbered ——, the funds and property of the said company were made liable to pay to the executors, administrators, or assigns of the said [*vendor*], the sum of £—— within the period of —— months after his decease, subject nevertheless to the provisoes therein contained, And also to the payment of the annual premium of £——, during the life of the said [*vendor*]: AND WHEREAS the said [*purchaser*] hath contracted with the said [*vendor*] for the absolute purchase of the said policy of assurance at the price or sum of £——. NOW THIS INDEN-

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Geo. 3, c. 48, (stated *ante*, Vol. 6, p. 139), observed—" There is not a word said here as to the assignment of policies. This policy was good at the time it was effected. By an instrument of the 10th of March, 1810, an assignment of it was made; and, subsequently, the parties who had become entitled to the policy, sold it for a valuable consideration, under a decree of the Court; so that some person became entitled to bring an action on the policy in the name of the assured; *Brown* v. *Carter*, 5 Ves. 862; *Prodgers* v. *Langham*, 1 Sid. 133; and if such an action had been brought, there is not a word in the act of Parliament to defeat it. The question is, whether the dealing with the policy has been such as that a Court of Equity would compel the assured to permit the assignee to use his name in bringing an action on the policy. It appears to me that a purchaser for valuable consideration is entitled to stand in the place of the original assignor, so as to bring an action in his name for the sum insured. The case cited, *Godsall* v. *Boldero*, 9 East, 72, is not applicable; for there the action was brought by the assured; and at the time of the action brought, his interest had ceased; and, therefore, it came within the third section of the act of Parliament."

Observations upon *Ashley* v. *Ashley*.

On reading this case, the question which suggests itself is, would the principle of it apply if the insurance had been on the life of another person, instead of that of the assignor himself? The Vice-Chancellor's reasoning is certainly general as to the statute of the 14 Geo. 3 not extending to the claim of an assignee; but the case before his Honour did not raise the point, as the act in question evidently contemplates insurances on the lives of others only; for, the *quantum* of interest which by the third section is made the measure of the assured's claim to recover, has no application to a policy on the life of the assured himself; and if such a policy originally were not within the statute, the subsequent transaction which created the interest of the third person, could not bring it within its operation. The case therefore decided nothing as to insurances on another's life.

TURE WITNESSETH, that, in pursuance of the said contract, and in consideration of the sum of £—— of lawful money of Great Britain and Ireland, paid by the said [*purchaser*] to the said [*vendor*] at or immediately before the execution of these presents, the receipt of which said sum the said [*vendor*] doth hereby acknowledge, and therefrom doth absolutely acquit and discharge the said [*purchaser*], his executors, administrators, and assigns, he the said [*vendor*] *Doth* by these presents assign, transfer, and set over unto the said [*purchaser*], his executors, administrators, and assigns, ALL THAT the hereinbefore recited policy of assurance on the life of the said [*vendor*], *And also* the said sum of £—— thereby assured, and all and every other the sum and sums of money which shall or may become due and owing by virtue thereof; And all the right, title, interest, benefit, claim, and demand whatsoever at law or in equity of him the said [*vendor*], in and to the said policy, monies, and premises; TO HAVE, RECEIVE, AND TAKE the said policy of assurance, sum and sums of money, and other the premises hereby assigned, unto the said [*purchaser*], his executors, administrators, and assigns, for his and their own absolute use and benefit, with full power and authority for the said [*purchaser*], his executors, administrators, or assigns, at his or their own costs, in the name or names, and as the attorney or attornies of the said [*vendor*], his executors or administrators, to sue for and recover the sum or sums of money at any time or times hereafter to become recoverable by virtue of the hereinbefore recited policy of assurance, and to give effectual discharges for the same, with power from time to time to appoint a substitute or substitutes for all or any of the purposes aforesaid. AND the said [*vendor*], for himself, his heirs, executors, and administrators, doth hereby covenant with the said [*purchaser*], his executors, administrators, and assigns, that the hereinbefore recited policy of assurance is now in full force and virtue for the said sum of £—— thereby expressed to be assured; And that he the said [*vendor*] hath full power to assign the same unto the said [*purchaser*], his executors, administrators, and assigns, in the manner aforesaid; And that he the said [*vendor*] will not hereafter do any act, or commit any default (except so far as respects the payment of the future premium to become due in respect of the said po-

POLICY OF LIFE ASSURANCE.

Assignment.

Habendum.

Covenants by vendor.

POLICY OF LIFE ASSURANCE.

licy, which is to be made by the said [*purchaser*],) by means whereof the said policy of assurance shall become void or voidable, or the power or authority hereinbefore contained for receiving or recovering the monies to become due thereupon, shall be revoked or prejudicially affected, or the acts or proceedings of the said [*purchaser*], his executors, administrators, or assigns, or his or their substitute or substitutes by virtue thereof, shall be defeated or prejudiced; And that, in case he the said [*vendor*] shall hereafter go beyond the seas, or do any other act by reason whereof the premium payable in respect of the said policy shall be increased beyond the said annual sum of £——, then and in every such case he the said [*vendor*], his executors or admnistrators, will pay such additional premium, and effectually indemnify and save harmless the said [*purchaser*], his executors, administrators, and assigns, from all loss or damage in respect thereof (*b*); *And lastly*, that he the said [*vendor*], his executors or administrators, will at all times hereafter, on the request and at the costs of the said [*purchaser*], his executors, administrators, or assigns, make, do, and execute such further assignments, acts, and assurances, for the more effectually vesting in him the said [*purchaser*], his executors, administrators, and assigns, the said policy of assurance, monies, and premises expressed to be hereby as-

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As to vendor's covenant not to leave the kingdom.

(*b*) The propriety of this covenant depends on the nature of the agreement between the parties. If the vendor does not go the length of contracting to pay any additional premium which his departure from England might occasion (which is certainly not of course), he ought at least to stipulate not to leave the country without notice, and without affording the purchaser an opportunity of paying the additional premium. The covenant would then be varied as follows:—

"And that he the said [*vendor*] will not at any time hereafter go or travel to any place or places out of Great Britain, without giving previous notice or intimation in writing of his intention so to do, to the said [*purchaser*], his executors, administrators, or assigns, so as to afford him or them an opportunity of paying any additional premium or premiums, which according to the terms of such policy would become payable in that event."

Sometimes, by the terms of the policy, an additional premium becomes payable on entering into active military or naval service.

signed, and for confirming to him or them the power and authority hereinbefore contained, as by the said [*purchaser*], his executors, administrators, or assigns, shall be reasonably required. AND the said [*purchaser*], for himself, his heirs, executors, and administrators, doth hereby covenant with the said [*vendor*], his executors and administrators, that he the said [*purchaser*], his executors and administrators, will at all times hereafter effectually save harmless and keep indemnified the said [*vendor*], his executors, administrators, and assigns, from and against all losses, costs, damages, and expenses whatsoever, which he or they may incur or sustain by reason of any action or other proceeding which shall or may be brought by the said [*purchaser*], his executors or administrators, or his or their substitute or substitutes, in the name or names of the said [*vendor*], his executors, or administrators, by virtue of the power or authority in that behalf hereinbefore contained, or in relation thereunto (*c*). IN WITNESS, &c.

POLICY OF LIFE ASSURANCE.

Covenant of indemnity by purchaser.

(*c*) In *Blandy* v. *Herbert*, 9 Barn. & Cress. 396, it was held, that an assignment of a policy of marine insurance on which no loss had occurred, was not a conveyance of "property" within the meaning of the stamp act, so as to be the subject of an *ad valorem* stamp, *vide ante*, p. 205. Perhaps, it is not quite clear that the principle would apply to an assignment of a policy of life insurance, which is distinguishable from a marine insurance, in the fact, that the event on which the money is payable is not, though the time of it is, contingent. It would be safer, therefore, to place an *ad valorem* duty on this deed; but see the observations at the end of the last precedent, *ante*, p. 316.

As to the necessity of an *ad valorem* stamp.

Notice of this assignment should be given to the insurance office, especially if the assignor be a trader, as otherwise his bankruptcy would defeat the purchaser's title. *Williams* v. *Thorpe*, 2 Sim. 257.

ASSIGNMENT OF TERM TO ATTEND.

ASSIGNMENT *by one of several Executors, of a satisfied* TERM *created in a Marriage Settlement, In Trust for a* PURCHASER, *and to* ATTEND *the* INHERITANCE, *where the Term relates to other Premises, and the Conveyance of the Fee is not Contemporaneous.*

Parties.

THIS INDENTURE, made the —— day of ——, in the year of our Lord ——, BETWEEN [*assignor*], of &c., of the first part; [*vendor*], of &c., of the second part; [*purchaser*], of &c., of the third part; and [*trustee*], of &c., of the fourth part.

Recital of settlement creating term.

WHEREAS, by indentures of lease and release, bearing date respectively on or about the —— and —— days of ——, in the year of our Lord ——, the indenture of release being of four parts, and made, or expressed to be made, between [A. B.], Esq., of the first part; [C. D.], of the second part; [E. F.], spinster, daughter of the said [C. D.], of the third part; and [G. H.] and [I. K.], of the fourth part; (being a settlement made on a marriage then intended to be had, and which was afterwards solemnized between the said [A. B.] and [E. F.]); the —— and hereditaments hereinafter described, and hereby assigned, or intended so to be, with their appurtenances, were conveyed and assured, (subject to and in expectancy upon certain uses in the same indenture mentioned, and which are since determined, and have failed of effect), *To the use* of the said [G. H.] and [I. K.], their executors, administrators, and assigns, for and during the term of one thousand years fully to be complete and ended, without impeachment of waste, upon divers trusts declared of the same term, and which were long since performed, satisfied, or discharged.

—Will of surviving trustee.

AND WHEREAS the said [G. H.] survived the said [I. K.], and, by his last will and testament in writing, bearing date on or about the —— day of ——, in the year of our Lord ——, appointed his son, the said [*assignor*], and certain other persons (*a*), executors thereof;

—Probate.

AND WHEREAS the said will of the said [*testator*]

(*a*) *Vide* an observation, *ante*, p. 243.

ASSIGNMENT OF TERM TO ATTEND.

was duly proved by the said [*assignor*] and the said other executors thereof, in the Prerogative Court of the Archbishop of Canterbury, on or about the —— day of ——, in the year of our Lord ——; AND WHEREAS, under or by virtue of divers mesne conveyances and other acts and assurances in the law (*b*); and ultimately, by indentures of lease and release, bearing date respectively the —— day of ——, the indenture of release being of four parts, and made, or expressed to be made, between the said [*vendor*] and [*wife*], his wife, of the first part; the Right Honourable ——, of the second part; the said [*purchaser*], of the third part; and [*dower trustee*], of the fourth part; And by a fine duly levied, or to be levied, in pursuance of a covenant contained in the now being recited indenture of release, for that purpose; and by a declaration of the uses of that fine, contained in the same indenture, part of the hereditaments comprised in the said term of one thousand years, that is to say, ALL THAT *(here recite the parcels fully)*; And all profits, commodities, advantages, and appurtenances whatsoever to the said hereditaments belonging, or in anywise appertaining, have been conveyed and assured to such uses as the said [*purchaser*] should appoint, in manner and by the means in the indenture of release now being recited mentioned; and in default of such appointment, and in the mean time subject thereto, *To the use* of the said [*purchaser*] and his assigns, during his life, with remainder *To the use* of the said [*dower trustee*] and his heirs, for the life of the said [*purchaser*], *In trust* for him and his assigns, with remainder *To the use* of the said [*purchaser*], his heirs and assigns, for ever. AND WHEREAS, on the application and at the request of the said [*vendor*] and [*purchaser*], the said [*assignor*] hath agreed to assign the said —— and hereditaments conveyed by the hereinbefore recited indentures of lease and release, or so much thereof as is comprised

—The last conveyance of the fee.

—Agreement to assign the term.

(*b*) It is usual to recite all the assurances affecting the fee since the creation or last assignment of the term, but where they are numerous, particularly if the property be small, this plan may be properly relinquished. The assigning trustee, indeed, may and ought to require the title to the fee to be deduced, for the period over which his trusteeship extends, and perhaps in strictness may insist on its being recited; but under such circumstances he may properly dispense with the recital.

ASSIGNMENT OF TERM TO ATTEND.

in the said term of one thousand years, unto the said [*trustee*], In trust for the said [*purchaser*], his heirs, appointees, and assigns; and to attend the inheritance of the same premises, in manner hereinafter mentioned.

Testatum.

NOW THIS INDENTURE WITNESSETH, that, in consideration of the premises, and of 10*s.* of lawful money of Great Britain and Ireland, to the said [*assignor*] paid by the said [*trustee*] before the execution of these presents, the receipt whereof is hereby acknowledged, he the said [*assignor*], on the nomination of the said [*purchaser*], and by the direction of the said [*vendor*], testified by their severally executing these presents, and by way of assignment or other assurance only, and not by way of covenant or warranty, *Hath* bargained, sold, assigned, transferred, and set over, and by these presents *Doth* bargain, &c., unto the said [*trustee*], his executors, administrators, and assigns, ALL THOSE the said —— and hereditaments which are mentioned or comprised in the said hereinbefore in part recited indentures of lease and release, bearing date respectively on or about the —— and —— days of ——, and which are, or are expressed and intended to be, thereby assured, to the uses hereinbefore mentioned or referred to, or all such and so many and such parts of the same —— and hereditaments, as are comprised in and subject to the said term of one thousand years, with their and every of their rights, members, and appurtenances; And all the estate, right, title, interest, trust, term and terms for years, property, possession, benefit, claim and demand whatsoever, at law and in equity, or otherwise howsoever, of him the said [*assignor*] in, to, and upon the said —— and hereditaments hereby assigned, or intended so to be, with their appurtenances; TO HAVE AND TO HOLD the said —— and hereditaments, and all and singular other the premises hereby assigned, or intended so to be, with their and every of their appurtenances, unto the said [*trustee*], his executors, administrators, and assigns, henceforth, for all the residue now unexpired of the said term of one thousand years, and for all other the estate, term, and interest of the said [*assignor*], as such executor as aforesaid therein; IN TRUST, nevertheless, for the said [*purchaser*], his appointees, heirs, and assigns, according to the uses and trusts which have been declared for his and their benefit as aforesaid, and to be assigned and disposed of from time to time as he or they shall direct and

Vendor's trustee assigns to purchaser's trustee.

Parcels.

All the estate, &c.

Habendum;

In trust for purchaser, and to attend the inheritance.

appoint; and, in the mean time, to attend, wait upon, and go along with the freehold, reversion, and inheritance of the said messuage or tenement and hereditaments hereby assigned, or intended so to be; *To the end* that the same freehold, reversion, and inheritance, may, by means of the said term, be protected from and against all incumbrances (if any such there be) mesne and subsequent to the creation of the same term; and upon no other trust, nor for any other end, intent, or purpose whatsoever. *(Covenant by assignor with trustee, that he has not incumbered).* IN WITNESS, &c.

ASSIGNMENT OF TERM TO ATTEND.

ASSIGNMENT OF TERM TO ATTEND.

ASSIGNMENT *of a* TERM *to attend the Inheritance, by a* SEPARATE DEED, *where the Purchase-money for which the* FEE-SIMPLE *is sold is* PAID *to the* MORTGAGEE *of the* TERM (*a*). *(Variations where Part only of the Purchase-money is paid to the Mortgagee. Also, where Part only of the Property comprised in the Term is conveyed to the Purchaser).*

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*mortgagee*], of &c., of the first part; [*vendor*], of

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Remarks upon the precedent in the text.

(*a*) This precedent exemplifies the mode by which (according to a suggestion in a former note, *vide ante*, Vol. 5, p. 179,) a term vested in a mortgagee, who is paid off out of purchase-money, is assigned by a separate deed. The deed of assignment in such a case explains the real nature of the transaction, which is not quite accurately represented on the face of the conveyance of the fee. If the purchaser be himself the mortgagee, the form of the draft will not be much altered, the principal variation being, that the mortgage-money will be described as *retained by*, instead of being *paid to* him, but the conveyance of the fee ought in this instance to be treated as *posterior* to that of the term, since, if the freehold vest in him previously to his assignment of the term, the latter will have become merged by their union in the purchaser. Indeed, in order to secure the priority of the assignment of the term, and thereby prevent the possibility of merger, it seems better to date the release a day later than the assignment, of course varying the recitals accordingly.

ASSIGNMENT OF TERM TO ATTEND.

&c., of the second part; [*purchaser*], of &c., of the third part; and [*purchaser's trustee*], of &c., of the fourth part: WHEREAS, by an indenture of demise by way of mortgage, bearing date on or about the —— day of ——, made between the said [*vendor*], of the one part; and the said [*mortgagee*], of the other part; in consideration of the sum of 1200*l.* lent and advanced by the said [*mortgagee*] to the said [*vendor*], the said [*vendor*] did demise unto the said [*mortgagee*], his executors, administrators, and assigns, ALL THAT *(describe parcels)*, *To hold* the same unto the said [*mortgagee*], his executors, administrators, and assigns, for the term of five hundred years thence next ensuing, subject to a proviso for redemption on payment by the said [*vendor*], his heirs, executors, administrators, and assigns, unto the said [*mortgagee*], his executors, administrators, or assigns, of the said sum of 1200*l.* and interest on a day therein mentioned, and long since passed. AND WHEREAS the said [*vendor*] lately contracted and agreed with the said [*purchaser*] for the absolute sale to him of the said ——, at or for the sum of 1050*l.*; And accordingly, by indentures of lease and release, the lease bearing date the day next before the day of the date of these presents, and the release bearing even date with these presents, the latter made between the said [*vendor*], of the first part; the said [*purchaser*], of the second part; and [*purchaser's trustee*], therein described, of the third part; In consideration of the said sum of 1050*l.* therein expressed to be paid by the said [*purchaser*] to the said [*vendor*], the receipt whereof is thereby acknowledged, he the said [*vendor*] did convey and assure unto the said [*purchaser*], his heirs and assigns (*b*), the said ——, hereditaments and premises comprised in and demised by the hereinbefore recited indenture of mortgage, with their appurtenances, *To hold* the same unto and to the use of the said [*purchaser*], his heirs and assigns, for ever: AND WHEREAS,

Recital of deed creating the term,

—Contract of sale, and contemporaneous conveyance of the fee.

Agreement for the assignment of the term.

(*b*) If the property purchased comprise part only of that included in the term, say—

Variation where the term comprises other property.

"part of the hereditaments and premises comprised in and demised by the hereinbefore recited indenture of demise or mortgage, by the description of ALL THAT *(describe parcels as in the deed of release)*."

upon the treaty of the said purchase, it was agreed (*c*), that the said purchase-money or sum of 1050*l.* should be applied towards the discharge of the said mortgage debt of 1200*l.*, (the interest thereon having been wholly paid and discharged), and that the residue of the said mortgage debt should be paid off and discharged by the said [*vendor*]; And that thereupon the residue of the said term of five hundred years, of and in the said purchased premises, should be assigned to a trustee for the said [*purchaser*]. AND WHEREAS, in pursuance of the said agreement in that behalf, the said sum of 1050*l.* (*d*) in the said indenture of even date herewith mentioned to have been paid to or on the account of the said [*vendor*], was paid to the said [*mortgagee*] (*e*), in part satisfaction and discharge of the said mortgage debt of 1200*l.* NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement in this behalf, and in consideration of the said sum of 1050*l.* so paid to the said [*mortgagee*] by the said [*purchaser*], as hereinbefore is mentioned (*f*), And for and in consideration of the sum of 150*l.* of lawful money of Great Britain and Ireland, at or

ASSIGNMENT OF TERM TO ATTEND.

—That purchase-money was paid to mortgagee.

Testatum.

In consideration of purchase-money, and a further sum to

(*c*) If part only of the purchase-money is paid to the mortgagee, say—

"that the said sum of £——, part of the said purchase-money, should be applied in satisfaction and discharge of the said principal sum of £—— owing to the said [*mortgagee*] upon the said recited indenture of mortgage (all interest thereon having been previously paid and discharged), and that thereupon the residue" &c., *ut supra.*

Variations where part only of the purchase-money is paid to the mortgagee.

(*d*) If part only of the purchase-money is paid to the mortgagee, say—

"part of the said sum of £—— in the said indenture," &c. *ut supra.*

(*e*) If part only of the purchase-money is paid to the mortgagee, say—

"in full satisfaction and discharge," *ut supra*, &c.

(*f*) If the purchase-money exceeds the mortgage debt, say—

"the receipt of which sum the said [*mortgagee*] doth hereby acknowledge, and doth declare the same to be in full satisfaction," &c.

ASSIGNMENT OF TERM TO ATTEND.

mortgagee, mortgagee assigns to trustee.

immediately before the sealing and delivery of these presents, to the said [*mortgagee*] paid by the said [*vendor*], the receipt of which said sums of 1050*l.* and 150*l.*, amounting together to the sum of 1200*l.*, the said [*mortgagee*] doth hereby acknowledge, and of and from the same doth acquit and discharge the said [*purchaser*], his heirs, executors, administrators, and assigns, and also the said [*vendor*], his heirs, executors, administrators, and assigns respectively, for ever by these presents, and doth declare the same to be in full satisfaction and discharge of all principal and interest monies due and owing to him on his aforesaid mortgage security, And in consideration of the sum of 10*s.*, to the said [*mortgagee*] paid by the said [*trustee*] at or immediately before the execution of these presents, the receipt whereof is hereby acknowledged, He the said [*mortgagee*], at the request and by the direction of the said [*vendor*], and on the nomination and appointment of the said [*purchaser*], testified by their severally executing these presents, *Hath* bargained, sold, assigned, transferred, and set over, And by these presents *doth*, &c., unto the said [*trustee*], his executors, administrators, and assigns (*g*), the said ——, hereditaments, and premises comprised in, and conveyed or expressed to be demised by, the hereinbefore recited indenture of mortgage of the —— day of ——, with the appurtenances; And all the estate, &c. To HAVE AND TO HOLD, &c. (*proceed ut ante*, p. 324, *but instead of the words* "In trust, nevertheless, for the said [*purchaser*], his appointees, heirs, and assigns, according to the uses and trusts which have been declared for his and their benefit as aforesaid," *say*, "In trust for the said [*purchaser*], his heirs and assigns, and to be assigned," &c.) IN WITNESS, &c.

And all the estate, &c.

Variation where the term comprises other property.

(*g*) If the property purchased comprise part only of that included in the term, say—

"so much, and such and all such part or parts of the ——, hereditaments, and premises, comprised in and demised by the hereinbefore recited indenture of mortgage, as is or are conveyed and assured, or expressed to be conveyed and assured, by the hereinbefore recited indenture of release bearing even date herewith."

ASSIGNMENT *of two Satisfied Terms in Trust to attend the Inheritance, on a Purchase by* CO-PARTNERS *in* TRADE.

ASSIGNMENT OF TWO TERMS TO ATTEND.

THIS INDENTURE, made the —— day of ——, BETWEEN [*first assignor*], of &c., of the first part; [*second assignor*], of &c., of the second part; [*mortgagee*], of &c., of the third part; [*vendors*], of &c., of the fourth part; [*purchasers*], of &c., of the fifth part; and [*purchasers' trustee*], of &c., of the sixth part (*a*): WHEREAS, by indenture of lease, bearing date the day next before the day of the date of these presents, and by indenture of release bearing even date with these presents, and made or expressed to be made between the said [*mortgagee*], of the first part; the said [*vendors*], of the second part; the said [*purchasers*], of the third part; and [C. D.], of &c., and [E. F.], of &c., of the fourth part; in consideration of the sum of £——, therein expressed to be paid by the said [*purchasers*] to the said [*vendors*], for the absolute purchase of the inheritance in fee-simple of the hereditaments thereinafter mentioned, the said [*vendor*] did convey and assure unto the said [C. D.] and [E. F.], their heirs and assigns, ALL THAT *(describe parcels)*, To hold the same unto and to the use of the said [C. D.] and [E. F.], their heirs and assigns, In trust for the said [*purchasers*] respectively, and their respective heirs, executors, and administrators, as tenants in common, and as part of their copartnership and stock in trade in their business of distillers, and in the same parts, shares, and proportions as they are entitled to in the said copartnership, and as or in the nature of personalty, and for that purpose to be sold and converted into money on the dissolution or deter-

Parties.

Recital of purchase deed.

(*a*) As the two terms relate to different portions of the property, there is no objection to vesting them in the same trustee.

ASSIGNMENT OF TWO TERMS TO ATTEND.

mination of the said partnership, or sooner if the partners shall think fit: AND WHEREAS, by indenture bearing date on or about the —— day of ——, in the year ——, and made or expressed to be made between [*grantor*], of &c., of the one part; and [*grantee*], of &c., of the other part; *It is witnessed*, that, for the considerations therein mentioned, the said [*grantor*] did demise, grant, bargain, and sell unto the said [*grantee*] part of the hereditaments described in the recital hereinbefore contained, by the description of *(describe parcels); To hold* the same unto the said [*grantee*], his executors, administrators, and assigns, for the term of one thousand years, subject to a proviso for making void the same in manner therein mentioned: AND WHEREAS the proviso contained in the lastly hereinbefore (*b*) recited indenture was never performed, but by divers mesne assignments, and other acts and assurances in the law, and ultimately by indenture of four parts, bearing date on or about the —— day of ——, in the year ——, and made or expressed to be made between [*termor*], of the first part; the said [*vendors*], of the second part; the said [*mortgagee*], of the third part; and the said [*first assignor*], of the fourth part; the said hereditaments comprised in and demised by the lastly hereinbefore recited indenture were assigned to and became absolutely vested in the said [*first assignor*] for the residue of the said term of one thousand years therein, *In trust* for the said [*mortgagee*], his executors, administrators, and assigns, for better securing the payment of the sum of £——, and interest, according to the proviso contained in a certain indenture of release therein recited, being an indenture of release by way of mortgage, by which the said sum of £——, and interest, were secured to the said [*mortgagee*], his executors, administrators, and assigns; and, from and after payment thereof, *In trust* for the said [*vendors*], their heirs and assigns, in the shares and proportions to which they were respectively entitled to the freehold and inheritance of the said premises by virtue

—Of the deed creating one of the terms.

—Of assignment of term for the benefit of a mortgagee.

(*b*) If the purpose for which the term was created is disclosed by the recital, the satisfaction of such purpose ought to be shewn by the subsequent recitals. Here, both are avoided.

of the said indenture of release, and to attend the inheritance, and to protect the same from mesne incumbrances. And whereas the principal and interest monies secured by the lastly hereinbefore recited indenture of mortgage have been wholly paid off and discharged, as the said [*mortgagee*] doth hereby acknowledge (*c*). And whereas, by indenture bearing date on or about the —— day of ——, in the year ——, and made or expressed to be made between [*grantors*], of the one part; and [*grantee*], of the other part: *It is witnessed*, that, for the considerations therein mentioned, the said [*grantors*] did (according to their respective rights and interests), demise, grant, bargain, and sell unto the said [*grantee*] (among other hereditaments), other part of the hereditaments described in the firstly hereinbefore in part recited indenture of lease, and indenture of release, by the description of *(describe parcels)*, *To hold* the same unto the said [*grantee*], her executors, administrators, and assigns, from the day of the date of the indenture now in recital, for the term of five hundred years, subject to a proviso or condition for making void the same indenture, which proviso or condition was never performed, by reason whereof the said term became absolute; And whereas, by indenture of four parts, bearing date on or about the —— day of ——, in the year ——, and made or expressed to be made between [A. B.], of the first part; the said [*grantee in last deed*], of the second part; the said [*grantors in last deed*], of the third part; the said [*vendors*], of the fourth part; and the said [*second assignor*], of the fifth part: *It is witnessed*, that, for the considerations therein mentioned, the said [*grantee in last deed*] did bargain, sell, assign, transfer, and set over, unto the said [*second assignor*], his executors, administrators, and assigns, the hereditaments comprised in the lastly hereinbefore in part recited indenture, *To hold* the same unto the said [*second assignor*], his executors, administrators, and assigns, thenceforth for the remainder of the said term of five hundred years, *In trust* for the said [*vendor*], his heirs and assigns; and to attend the reversion and inheritance of the said premises. And whereas the said [*purchasers*] have re-

ASSIGNMENT OF TWO TERMS TO ATTEND.

—Assignment of last-mentioned term to attend the inheritance.

—Request of purchasers that

(*c*) The mortgagee joins in the present deed for the purpose of authorizing the trustee to assign the term.

ASSIGNMENT OF TWO TERMS TO ATTEND.

quested that the several residues of the said several terms of one thousand years and five hundred years as aforesaid, may be assigned to the said [*purchasers' trustee*], In trust for them, to attend the inheritance in manner hereinafter mentioned. NOW THIS INDENTURE WITNESSETH, that, in consideration of the premises, and also in consideration of 10*s.* to the said [*first assignor*] paid by the said [*purchasers' trustee*], immediately before the execution of these presents, the receipt whereof is hereby acknowledged, He the said [*first assignor*], on the nomination and appointment of the said [*purchasers*], and by the direction and appointment, and with the privity, consent, and approbation of the said [*vendor*] and [*mortgagee*], so far as they respectively are interested, testified by their severally executing these presents, *Hath* bargained, sold, assigned, and transferred, and by these presents *Doth* &c., unto the said [*purchasers' trustee*], his executors, administrators, and assigns, ALL such and so many and such part and parts of the said —— and hereditaments described in the hereinbefore recited indenture of release, bearing even date with these presents, as were assigned to the said [*first assignor*] by the said hereinbefore in part recited indenture, bearing date on or about the —— day of ——, with their and every of their appurtenances; And all the estate, &c., TO HAVE AND TO HOLD the said hereditaments, and all and singular other the premises hereby assigned or otherwise assured by the said [*first assignor*], or intended so to be, with their and every of their appurtenances, unto the said [*purchaser's trustee*], his executors, administrators, and assigns, henceforth during all the residue now unexpired of the said term of one thousand years therein, and for all other the estate, term, and interest, if any, of the said [*first assignor*] therein, nevertheless, upon the trusts, and for the ends, intents, and purposes hereinafter expressed and declared concerning the same. *(Covenant by first assignor against incumbrances).* AND THIS INDENTURE FURTHER WITNESSETH, that, in consideration of the premises, and also in consideration of 10*s.* of lawful money aforesaid, to the said [*second assignor*] paid by the said [*purchasers' trustee*] immediately before the execution of these presents, the receipt whereof is hereby acknowledged, He the said [*second assignor*], on the nomination and ap-

terms should be assigned.

Testatum.

Vendor's trustee, on the nomination of purchasers, assigns to purchasers' trustee.

Premises comprised in first term.

Habendum.

Further *testatum.*

Vendor's trustee, on the no-

ASSIGNMENT OF TWO TERMS TO ATTEND.

pointment of the said [*purchasers*], and by the direction and appointment of the said [*vendor*], testified as aforesaid, *Hath* bargained, sold, assigned, and transferred, And by these presents *Doth* &c., unto the said [*purchasers' trustee*], his executors, administrators, and assigns, ALL such and so many, and such part and parts of the said —— and hereditaments described in the firstly hereinbefore in part recited indenture of release, bearing even date with these presents, as were assigned to the said [*second assignor*], his executors, administrators, and assigns, by the said hereinbefore in part recited indenture, bearing date on or about the —— day of ——, with their and every of their appurtenances, And all the estate, &c.; TO HAVE AND TO HOLD the said hereditaments, and all and singular other the premises hereby assigned or otherwise assured by the said [*second assignor*], or intended so to be, with their and every of their appurtenances, unto the said [*purchaser's trustee*], his executors, administrators, and assigns, henceforth for and during all the residue now unexpired of the said term of five hundred years, and for all other the estate, term, and interest, if any, of the said [*second assignor*] therein, nevertheless upon the trusts, and to and for the ends, intents, and purposes hereinafter expressed and declared concerning the same. *(Covenant by second assignor against incumbrances).* AND *it is hereby directed, declared, and agreed* by and between the parties to these presents, as far as they respectively are interested, that the residue now unexpired in the said several terms of one thousand years, and five hundred years, and all other the estates, terms, and interests, if any, hereinbefore respectively assigned to the said [*purchasers' trustee*], his executors, administrators, and assigns, are so assigned to him and them, *Upon trust*, nevertheless, for the said [*purchasers*] respectively, and their respective executors, administrators, and assigns, according to their respective shares in the capital of the said copartnership trade, and to be assigned and disposed of from time to time as they respectively shall direct and appoint, and in the meantime, to attend, wait upon, and go along with the freehold, reversion, and inheritance of the same hereditaments and premises, as the same have been conveyed and assured in or by the said indenture of release bearing even date with

mination of purchasers, &c., assigns to purchasers' trustee.

Premises comprised in second term.

Habendum.

Declaration of trusts.

ASSIGNMENT OF TWO TERMS TO ATTEND.

these presents, *To the end* that the same freehold, reversion, and inheritance, may, by means of the said terms or other estates and interests in the said hereditaments respectively, be protected from and against all incumbrances, if any, mesne and subsequent to the creation of the same terms, estates, and interests respectively. IN WITNESS, &c.

OF TWO TERMS TO SEPARATE TRUSTEES TO ATTEND.

ASSIGNMENT *of two* TERMS *in the same Property to two separate Trustees, on a Sale by Trustees for Sale in a Marriage Settlement* (*a*), IN TRUST *for better securing* MORTGAGE MONEY; *and, subject thereto,* IN TRUST *for* PURCHASER, *and to* ATTEND *the* INHERITANCE.

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*first assignor*], of &c., only son, and also administrator *de bonis non* of the goods and chattels, rights, credits, and effects of [*deceased termor*], deceased, left unadministered by [*deceased executor*], deceased, of the first part; [*second assignor*], of &c., of the second part; [*trustees for sale*], of &c., and [*husband*], of &c., and [*wife*], his wife, of the third part; [*purchaser*], of &c., of the fourth part; [*mortgagee*], of &c., of the fifth part; [*trustee of first term*], of &c., of the sixth part; and [*trustee of the second term*], of &c., of the seventh part. WHEREAS, by indenture bearing date on or about the —— day of ——, and made between [*mortgagor*] therein described, of the one part; and [*mortgagee*], therein also described, of the other part: For the considerations therein expressed, the said [*mortgagor*] did grant, bargain, and sell unto the said [*mortgagee*], ALL THAT messuage or dwelling-house &c., *(full description of the parcels); To hold* the same unto the said [*mortgagee*], her exe-

Recital of creation of term.

(*a*) The terms are vested in separate trustees in order to prevent a merger.

cutors, administrators, and assigns, from the day next before the day of the date thereof, for the term of five hundred years, subject, nevertheless, to a proviso or condition therein contained for redemption of the said messuage and hereditaments, on payment by the said [*mortgagor*], his heirs, executors, administrators, or assigns, unto the said [*mortgagee*], her executors, administrators, or assigns, of the sum of 500*l.* and interest, on the —— day of ——, then next: AND WHEREAS default was made in payment of the said sum of 500*l.* and interest, on the day appointed for payment thereof by the said recited indenture; AND WHEREAS, by indenture bearing date on or about the —— day of ——, and made between the said [*mortgagee*], of the first part; [J. S.], therein described, of the second part; and the said [*deceased termor*], deceased, of the third part: For the considerations therein expressed, the said [*mortgagee*] did assign unto the said [*deceased termor*], the hereditaments and premises comprised in the said recited indenture of the —— day of ——, *To hold* the same unto the said [*deceased termor*], his executors, administrators, and assigns, for all the then remainder of the said term of five hundred years, In trust for the said [*husband*], his heirs and assigns, and to attend the inheritance of the same premises; AND WHEREAS the said [*deceased termor*], departed this life some time in the year ——, having duly made and published his last will and testament in writing, bearing date on or about the —— day of ——, and thereof appointed his brother [*brother*], and his the said testator's wife [*executrix*], executor and executrix thereof, and the said [*executrix*] alone duly proved the said will in the——Court of——. AND WHEREAS the said [*executrix*] departed this life some time in the year, —— intestate; AND WHEREAS the said [*brother*], the brother of the said testator, hath departed this life without having proved the will of the said [*deceased termor*]; AND WHEREAS letters of administration of all and singular the goods, chattels, rights, and credits of the said [*deceased termor*], deceased, left unadministered by the said [*executrix*], have been granted by the —— Court of ——, unto the said [*first assignor*]; AND WHEREAS, by indenture bearing date on or about the —— day of ——, and made between the said [*mortgagor*], of the one part; and [*second mortgagee*], therein described,

OF TWO TERMS TO SEPARATE TRUSTEES TO ATTEND.

—Default in payment.

—Indenture of assignment.

—Death of termor, will and probate.

—Death of executrix.

—Death of other executor without having proved.

—Letters of administration.

—Indenture creating second term.

OF TWO TERMS TO SEPARATE TRUSTEES TO ATTEND.

of the other part: For the considerations therein expressed, the said [*mortgagor*] did grant, bargain, sell, and demise unto the said [*second mortgagee*], (amongst other hereditaments), the said messuage and other hereditaments hereinbefore described, *To hold* the same unto the said [*second mortgagee*], her executors, administrators, and assigns, from the day next before the day of the date thereof, for the term of five hundred years, subject to redemption on payment by the said [*mortgagor*], his heirs, executors, administrators, or assigns, unto the said [*second mortgagee*], her executors, administrators, or assigns, the sum of 1200*l.* and interest on the —— day of —— then next. AND WHEREAS default was made in payment of the said sum of 1200*l.* and interest, on the day appointed for payment thereof by the said recited indenture of the —— day of ——. AND WHEREAS, by virtue of divers mesne assignments, and other acts good and available in the law, and ultimately by indenture bearing date on or about the —— day of ——, and made between the said [*second mortgagee*], of the first part; [C. D.], therein described, of the second part; the said [*husband*], of the third part; and the said [*second assignor*], of the fourth part: The said messuage and other hereditaments comprised in the aforesaid term of five hundred years, granted by the said recited indenture of the —— day of ——, became vested in the said [*second assignor*] for all the then residue of the same term, In trust for the said [*husband*], his heirs and assigns, and to attend the inheritance. AND WHEREAS, by indentures of lease and release, bearing date respectively the —— and —— days of ——, the release being made between the said [*husband*], of the first part; the said [*wife*], of the second part; and the said [*trustees for sale*], of the third part: (Being the settlement made previously to and in consideration of a marriage then intended and since solemnized between the said [*husband*] and [*wife*],) the messuage or dwelling-house and other hereditaments hereinbefore described were conveyed and assured unto and to the use of the said [*trustees for sale*], their heirs and assigns, upon such trusts as are therein declared, for the benefit of the said [*husband*] and [*wife*], and the issue of the said then intended marriage; in which said indenture of release is contained a power enabling the said

—Default in payment of mortgage money.

—Assignment to second assignor.

—Marriage settlement of husband and wife, with power to trustees to sell.

[*trustees for sale*], and their heirs, on the requisition and with the consent and approbation of the said [*husband*] and [*wife*], testified in writing under their hands and seals, and attested by two or more credible witnesses, to sell and convey the said messuage or dwelling-house and other hereditaments, and to give receipts for the monies for which the same should be sold. And whereas the said [*trustees for sale*], at the request and with the consent and approbation of the said [*husband*] and [*wife*], his wife, have contracted with the said [*purchaser*] for the sale and conveyance to him of the said messuage or dwelling-house and other hereditaments, and the inheritance thereof in fee-simple, free from incumbrances, with other hereditaments, at or for the price or sum of £——, and in consideration thereof, by indentures of lease and release, bearing date respectively, the lease the day before, and the release even date with these presents, and made between the said [*trustees for sale*], of the first part; the said [*husband*] and [*wife*], his wife, of the second part; the said [*purchaser*], of the third part; the said [*mortgagee*], of the fourth part; and [*dower trustee*], therein described, of the fifth part: And which said indenture of release, as to the signing, sealing, and delivery thereof, by the said [*husband*] and [*wife*], his wife, is attested by two credible witnesses, the said messuage and other hereditaments hereinbefore described and comprised in the said several terms of five hundred years, and five hundred years, respectively, are with other hereditaments conveyed and assured *To the use* of the said [*mortgagee*], his executors, administrators, and assigns, for the term of two thousand years, subject to a proviso for making the same void upon payment by the said [*purchaser*], his heirs, executors, administrators, or assigns, unto the said [*mortgagee*], his executors administrators, or assigns, of the sum of £—— and interest, on the time and in manner mentioned in the said indenture of release; And from and after the end, expiration, or other sooner determination of the said term of two thousand years, and in the meantime subject thereto, *To the use* of the said [*purchaser*], his appointees, heirs, and assigns, in manner in the same indenture of release also mentioned. And whereas, upon the treaty for the said purchase, it was agreed that the residue of the said several terms of five hundred

OF TWO TERMS TO SEPARATE TRUSTEES TO ATTEND.

—Contract for sale.

—Conveyance by lease and release to mortgagee, subject to redemption by purchaser.

—Agreement to assign.

OF TWO TERMS TO SEPARATE TRUSTEES TO ATTEND.

years, and five hundred years, should be assigned to trustees to be named by the said [*purchaser*] and [*mortgagee*], upon and for the trusts, intents, and purposes hereinafter expressed and declared of and concerning the same.

Testatum.

NOW THIS INDENTURE WITNESSETH, that, in

Administrator, by the direction of trustees, mortgagee, and purchaser, assigns to first trustee.

consideration of the premises, and also in consideration of the sum of ten shillings of lawful money of Great Britain and Ireland, to the said [*first assignor*] paid by the said [*first trustee*], at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, the said [*first assignor*], at the request and by the direction of the said [*trustees for sale*], and [*husband*] and [*wife*], and on the nomination of the said [*purchaser*] and [*mortgagee*], (testified by their respectively executing these presents), *Hath* bargained, sold, assigned, transferred, and set over, and by these presents *Doth* bargain, sell, assign, transfer, and set over unto the said [*first trustee*], his executors, administrators, and assigns, the said messuage or dwelling-house, and all other the hereditaments hereinbefore described and comprised in the said term of five hundred years, created by the said recited indenture of the —— of ——, together with their and every of their rights, members, and appurtenances; And all the estate, right, title, trust, term and terms for years yet to come and unexpired, property, possession, benefit, claim, and demand whatsoever of the said [*first assignor*], in, to, or out of the said messuage and other hereditaments, and every part thereof. To HAVE AND TO HOLD the said messuage or dwelling-house and other the hereditaments hereinbefore expressed to be hereby assigned, with their appurtenances, unto the said [*first trustee*], his executors, administrators, and assigns, henceforth for and during all the rest, residue, and remainder of the said term of five hundred years, therein granted and demised by the said recited indenture of the —— day of ——, and now to come and unexpired; nevertheless, upon and for the trusts, intents, and purposes hereinafter expressed and declared of and concerning the same. *(Covenant by first assignor that he has not incumbered).*

Parcels.

All the estate.

Habendum.

Further *testatum.*

AND THIS INDENTURE FURTHER WITNESSETH,

Second assignor, by direction of trustees, mort-

that, in consideration of the premises, and also in consideration of the sum of ten shillings of lawful money aforesaid, to

the said [*second assignor*] paid by the said [*second trustee*], at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged; He, the said [*second assignor*], at the request and by the direction of the said [*trustees for sale*], and [*husband*] and [*wife*], and on the nomination of the said [*purchaser*] and [*mortgagee*], (testified as aforesaid), *Hath* bargained, sold, assigned, transferred, and set over, and by these presents *Doth*, &c. unto the said [*second trustee*], his executors, administrators, and assigns, the said messuage or dwelling-house and other hereditaments hereinbefore described, and comprised with other hereditaments in the said indenture of the —— of ——, and the said term of five hundred years thereby created, with their and every of their rights, members, and appurtenances; And all the estate, right, title, interest, trust, term and terms for years yet to come and unexpired, property, possession, benefit, claim, and demand whatsoever of the said [*second assignor*], in, to, and out of the said messuage and other hereditaments, and every part thereof; To HAVE AND TO HOLD the said messuage and other hereditaments lastly hereinbefore expressed to be hereby assigned, with their appurtenances, unto the said [*second trustee*], his executors, administrators, and assigns, for and during all the rest, residue, and remainder of the said term of five hundred years therein granted and created by the said recited indenture of the —— day of ——, and now to come and unexpired; Nevertheless upon and for the trusts, intents, and purposes hereinafter expressed and declared of and concerning the same. *(Covenant by second assignor that he has not incumbered).* AND *it is hereby agreed and declared between and by the said parties hereto*, that they the said [*first trustee*] and [*second trustee*] respectively, and their respective executors, administrators, and assigns, shall and do henceforth stand possessed of and interested in the said messuage and other hereditaments for the respective residues of the two several terms of five hundred years and five hundred years, for the better and more effectually securing unto the said [*mortgagee*], his executors, administrators, and assigns, payment of the said sum of £—— and interest, according to the purport, true intent, and meaning of the said indenture of release, bearing even date herewith as

OF TWO TERMS TO SEPARATE TRUSTEES TO ATTEND.

gagee, and purchaser, assigns to second trustee.

Parcels.

All the estate.

Habendum.

Declaration of the trusts of terms,

To secure mortgage money; and, subject thereto,

OF TWO TERMS TO SEPARATE TRUSTEES TO ATTEND.

In trust for purchaser, and to attend the inheritance.

aforesaid; And from and after full payment thereof, *Upon trust*, in the next place, for the said [*purchaser*], his heirs, appointees, and assigns, and to be respectively assigned and disposed of from time to time, as he or they shall direct or appoint; And in the meantime to attend, wait upon, and go along with the reversion, freehold, and inheritance of the same premises, in order and to the intent to protect and preserve the same from all mesne charges and incumbrances, if any such there be. IN WITNESS, &c. (*a*).

Conclusion of the title "Purchase Deeds."

Here closes the title Purchase Deeds. If it be thought that the space assigned to this head is scarcely commensurate with its importance, it must be remembered that it has been deprived of some portion of its contents by the anticipating encroachment of former titles. This is particularly the case in regard to Feoffments and Fines. Indeed, in the recent volumes, the Editor has given precedents which relate to fines and common recoveries with a reluctant and sparing hand, on account of the extreme probability of their being speedily abolished under the bill introduced into Parliament at the suggestion of his Majesty's Commissioners; for, though the learning respecting those assurances will not, for the present at least, become useless, the instruments exclusively appropriated to direct their operation will of course no longer be wanted. Precedents of deeds assigning shares in ships, canal shares, reversionary interests in stock, judgments, &c., will be found under the title "Mortgages," which might be easily converted into absolute assignments to a purchaser, by the introduction of alterations corresponding with those which distinguish the precedent of the assignment of a bond and policy of assurance under the present title, (*vide ante*, pp. 313, 317), from an assignment of a bond and of a policy of assurance to a mortgagee. It seemed therefore unnecessary to repeat them here.

STAMPS ON CONVEYANCES.

	£	s.	d.
STAMPS ON CONVEYANCES.			
CONVEYANCE, whether grant, disposition, lease, assignment, transfer, release, renunciation, or of any other kind or description whatsoever, *upon the sale* of any lands, tenements, rents, annuities, or other property, real or personal, heritable or moveable, or of any right, title, interest, or claim in, to, out of, or upon any lands, tenements, rents, annuities, or other property; that is to say, for and in respect of *the principal or only deed, instrument, or writing*, whereby the lands or other things sold shall be granted, leased, assigned, transferred, released, renounced, or otherwise conveyed to or vested in the purchaser or purchasers, or any other person or persons, by his, her, or their direction;			
Where the purchase or consideration-money therein or thereupon expressed shall not amount to 20*l.*	0	10	0
And where the same shall amount to—			
20*l.* and not amount to 50*l.*	1	0	0
50*l.* ——— 150*l.*	1	10	0
150*l.* ——— 300*l.*	2	0	0
300*l.* ——— 500*l.*	3	0	0
500*l.* ——— 750*l.*	6	0	0
750*l.* ——— 1,000*l.*	9	0	0
1,000*l.* ——— 2,000*l.*	12	0	0
2,000*l.* ——— 3,000*l.*	25	0	0
3,000*l.* ——— 4,000*l.*	35	0	0
4,000*l.* ——— 5,000*l.*	45	0	0
5,000*l.* ——— 6,000*l.*	55	0	0
6,000*l.* ——— 7,000*l.*	65	0	0
7,000*l.* ——— 8,000*l.*	75	0	0
8,000*l.* ——— 9,000*l.*	85	0	0
9,000*l.* ——— 10,000*l.*	95	0	0
10,000*l.* ——— 12,500*l.*	110	0	0
12,500*l.* ——— 15,000*l.*	130	0	0
15,000*l.* ——— 20,000*l.*	170	0	0

STAMPS ON CONVEYANCES.

	£	s.	d.
20,000*l.* ——— 30,000*l.*	240	0	0
30,000*l.* ——— 40,000*l.*	350	0	0
40,000*l.* ——— 50,000*l.*	450	0	0
50,000*l.* ——— 60,000*l.*	550	0	0
60,000*l.* ——— 80,000*l.*	650	0	0
80,000*l.* ——— 100,000*l.*	800	0	0
100,000*l.* or upwards	1000	0	0

And where any freehold lands or hereditaments in England shall be conveyed by a deed of feoffment, with or without any letter or letters of attorney therein contained to deliver or receive seisin, or by a deed of *bargain and sale inrolled;* such deed of feoffment or bargain and sale, unless accompanied with a lease and release, shall be charged with a *further* duty as follows:

If the purchase or consideration-money therein or thereupon expressed shall be under 20*l.*	0	10	0
If it shall amount to—			
20*l.* and not amount to 50*l.*	0	15	0
50*l.* ——— 150*l.*	1	0	0
150*l.* or upwards	1	15	0

But if there shall be both a feoffment and a bargain and sale inrolled, then the said further duty shall not attach on either.

Note.—The purchase or consideration-money is to be truly expressed and set forth in words at length, in or upon every such principal or only deed or instrument of conveyance.

And where any lands or other property, of different tenures or holdings, or held under different titles, contracted to be sold at one entire price for the whole, shall be conveyed to the purchaser in separate parts or parcels, by different deeds or instruments, the purchase or consideration-money shall be divided and apportioned in such manner as the parties shall think fit, so that a distinct price or consideration for each separate part or parcel may be set forth in or upon the principal or only deed or instrument of conveyance relating thereto; which shall be charged with the said *ad valorem* duty in respect of the price or consideration-money therein set forth.

And where any lands or other property, contracted to be purchased by two or more persons jointly, or by any person for himself and others, or wholly for others, at one entire price for the whole, shall be conveyed, in parts or parcels, by separate deeds or instruments, to the persons

£ s. d.

STAMPS ON CONVEYANCES.

for whom the same shall be purchased, for distinct parts or shares of the purchase-money; the principal or only deed or instrument of conveyance, of each separate part or parcel, shall be charged with the said *ad valorem* duty, in respect of the sum of money therein specified as the consideration for the same.

But if separate parts or parcels of such lands or other property shall be conveyed to, or to the use of, or in trust for different persons, in and by one and the same deed or instrument, then such deed or instrument shall be charged with the said *ad valorem* duty, in respect of the aggregate amount of the purchase or consideration-monies therein mentioned to be paid, or agreed to be paid, for the lands or property thereby conveyed.

And where any person, having contracted for the purchase of any lands or other property, but not having obtained a conveyance thereof, shall contract to sell to any other person, and the same shall in consequence be conveyed immediately to the sub-purchaser, the principal or only deed or instrument of conveyance shall be charged with the said *ad valorem* duty, in respect of the purchase or consideration-money therein mentioned to be paid, or agreed to be paid, by the sub-purchaser.

And where any person, having contracted for the purchase of any lands or other property, but not having obtained a conveyance thereof, shall contract to sell the whole, or any part or parts thereof, to any other person or persons, and the same shall in consequence be conveyed by the original seller to different persons, in parts or parcels, the principal or only deed or instrument of conveyance, of each part or parcel thereof, shall be charged with the said *ad valorem* duty, in respect only of the purchase or consideration-money which shall be therein mentioned to be paid, or agreed to be paid for the same, by the person or persons to whom, or to whose use, or in trust for whom, the conveyance shall be made, without regard to the amount of the original purchase-money.

And in all cases of such sub-sales as aforesaid, the sub-purchasers, and the persons immediately selling to them, shall be deemed and taken to be the purchasers and sellers, within the intent and meaning of the provisions and regulations of the aforesaid act of the forty-eighth year of his Majesty's reign, relating to the *ad valorem* duties on conveyances on the sale of property, thereby imposed,

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STAMPS ON CONVEYANCES.

and which are to be observed and enforced with regard to the said *ad valorem* duties hereby granted.

But where any sub-purchaser shall take an actual conveyance of the interest of the person immediately selling to him, which shall be chargeable with the said *ad valorem* duty in respect of the purchase or consideration-money paid or agreed to be paid by him, and shall be duly stamped accordingly, any deed or instrument of conveyance to be afterwards made to him, of the property in question, by the original seller, shall be exempted from the said *ad valorem* duty, and be charged only with the ordinary duty on deeds or instruments of the same kind not upon a sale.

And where any lands or other property separately contracted to be purchased of different persons, at separate and distinct prices, shall be conveyed to the purchaser, or as he shall direct, in and by one and the same deed or instrument, such deed or instrument shall be charged with the said *ad valorem* duty, in respect of the aggregate amount of the purchase or consideration-monies therein mentioned to be paid or agreed to be paid for the same.

And where any lands or other property shall be sold and conveyed, in consideration, wholly or in part, of any sum of money charged thereon by way of mortgage, wadset, or otherwise, and then due and owing to the purchaser, or shall be sold and conveyed, subject to any mortgage, wadset, bond, or other debt, or to any gross or entire sum of money, to be afterwards paid by the purchaser, such sum of money or debt shall be deemed the purchase or consideration-money, or part of the purchase or consideration-money, as the case may be, in respect whereof the said *ad valorem* duty is to be paid.

And to prevent doubts respecting what shall be deemed the principal deed or instrument of conveyance, in certain cases, it is hereby declared:

That, where any lands or hereditaments in England shall be conveyed by bargain and sale inrolled, and also by lease and release, or feoffment, with or without any such letter or letters of attorney therein contained as aforesaid, the release or feoffment shall be deemed the principal deed; and the bargain and sale shall be charged only with the duty hereby imposed on deeds in general. But the same shall not be inrolled or be available, unless

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STAMPS ON CONVEYANCES.

also stamped for testifying the payment of the *ad valorem* duty on the release or feoffment.

And where any lands or hereditaments shall be conveyed by lease and release, and also by feoffment, with or without any such letter or letters of attorney therein contained as aforesaid, the release shall be deemed the principal deed; and the feoffment shall be charged only with the duty hereby imposed on deeds in general. But the same shall not be available, unless also stamped for testifying the payment of the *ad valorem* duty on the release.

And where any copyhold or customary estate shall be conveyed, by a deed of bargain and sale, by the commissioners named in a commission of bankrupt, or by executors or others, by virtue of a power given by will, or by act of Parliament, or otherwise, where a surrender shall not be necessary, the deed of bargain and sale shall be deemed the principal instrument.

And in other cases of copyhold or customary estates, the surrender or voluntary grant, or the memorandum thereof respectively, if made out of Court, or the copy of Court roll of the surrender or voluntary grant, if made in Court, shall be deemed the principal instrument.

And copies of Court roll, made after the thirty-first day of August, 1815, of surrenders and voluntary grants made in Court before or upon that day, and subsequent to the 10th day of October, 1808, shall be charged with the said *ad valorem* duties. But copies of Court roll of surrenders and voluntary grants made before or upon the 10th day of October, 1808, shall not be liable thereto.

And grants, and copies of Court roll of grants of copyhold or customary estates for a life or lives, are to be charged, as well as those for any greater interest.

And where in Scotland there shall be a disposition or assignation, executed by the seller, and any other instrument or instruments, writing or writings, to complete the title, the disposition or assignation shall be deemed the principal instrument.

And where, *upon the sale of any annuity, or other right not before in existence*, the same shall not be created by actual grant or conveyance, but shall only be secured by bond, warrant of attorney, covenant, contract, or otherwise, the bond or other instrument by which the same shall be secured, or some one of such instruments, if there

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STAMPS ON CONVEYANCES.

be more than one, shall be deemed and taken to be liable to the same duty as an actual grant or conveyance.

And in the case of leases or tacks, where a yearly rent of 20*l.* or upwards shall be reserved as part of the consideration for the same, there shall be charged a further duty.

And where the principal or only deed or instrument of conveyance, together with any schedule, receipt, or other matter put or indorsed thereon, or annexed thereto, shall contain 2,160 words, or upwards, then, for every entire quantity of 1,080 words contained therein, over and above the first 1,080 words, a further *progressive* duty of 1 0 0

And where there shall be several deeds, instruments, or writings for completing the title to the property sold, such of them as are not liable to the said *ad valorem* duty shall be charged with the duty to which the same may be liable under any general or particular description of such deeds, instruments, or writings, contained in this schedule.

And where, *in any case not hereby expressly provided for*, of several deeds, instruments, or writings, a doubt shall arise which is the principal, it shall be lawful for the parties to determine for themselves which shall be so deemed, and to pay the said *ad valorem* duty thereon accordingly; and, if necessary, the other deeds, instruments, or writings, on which the doubt shall have arisen, shall be stamped with a particular stamp for denoting or testifying the payment of the *ad valorem* duty, upon all the deeds or instruments being produced, and appearing to be duly stamped in other respects.

And where there shall be duplicates of any deed or instrument, chargeable with the said *ad valorem* duty, exceeding 2*l.*, one of them only shall be charged therewith, and the other or others shall be charged with the ordinary duty on deeds or instruments of the same kind not upon a sale; and on the whole being produced duly stamped, as hereby required, the latter shall also be stamped with a particular stamp for denoting or testifying the payment of the said *ad valorem* duty.

And where any deed or instrument, operating as a conveyance on the sale of any property, shall operate also as a conveyance of any other than the property sold by way of settlement, or for any other purpose, or shall also contain any other matter or thing besides what shall be in-

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STAMPS ON CONVEYANCES.

cident to the sale and conveyance of the property sold, or relate to the title thereto; every such deed or instrument shall be charged, in addition to the duty to which it shall be liable as a conveyance on the sale of property, and to any progressive duty to which it may also be liable, with such further stamp duty as any separate deed, containing the other matter, would have been chargeable with, exclusive of the progressive duty.

Exemptions from the preceding Duties on Conveyances upon the Sale of Lands, &c.

All surrenders and other instruments, relating only to copyhold or customary estates, whose clear yearly value shall not exceed 20s.; but which are hereinafter otherwise charged.

All transfers of shares in the stock and funds of the Governor and Company of the Bank of England, and of the South Sea and East India Companies; but which are hereinafter otherwise charged.

All leases and tacks in consideration of a fine or grassum, for a life or lives not exceeding three, or for a term of years determinable with a life or lives not exceeding three, by whomsoever granted.

All leases in consideration of a fine for a term absolute, not exceeding twenty-one years, granted by ecclesiastical corporations, aggregate or sole.

And all voluntary grants made by the lord or lady of any manor, of any copyhold or customary lands or hereditaments for a life or lives, for a pecuniary consideration, and the copies of Court roll of such voluntary grants.

All which leases, tacks, grants, and copies, are hereinafter charged with ordinary duty.

Exemptions from the preceding and all other Stamp Duties, except the Duty on the Receipt for the Consideration-Money.

Conveyances of rents purchased under the act of the 34th year of his Majesty's reign, c. 75, for the better management of the land revenue of the Crown, and for the sale of fee farm and other unimproveable rents, upon subsequent sales thereof by the purchasers or their heirs or assigns, to the owners of the lands or other hereditaments, out of which the same are payable; where the consideration-money to be paid on such subsequent sales shall not exceed the sum of 10l.

STAMPS ON CONVEYANCES.

Exemptions from the preceding and all other Stamp Duties.

All transfers of shares in any of the government or parliamentary stocks or funds.

	£	*s.*	*d.*
CONVEYANCE of any kind whatever, *not otherwise charged in this schedule, nor expressly exempted from all stamp duty*	1	15	0
And where the same, together with any schedule, receipt, or other matter put or indorsed thereon, or annexed thereto, shall contain 2,160 words, or upwards, then, for every entire quantity of 1,080 words contained therein, over and above the first 1,080 words, a further *progressive* duty of	1	5	0

RELEASES AND COMPOSITION DEEDS.

I. AS TO THE POWERS, DUTIES, AND RESPONSIBILITIES OF EXECUTORS AND TRUSTEES*.

1. *In regard to Investments, the Deficiency of Securities, and Failure of Bankers and other Agents.*
2. *How far responsible for the Acts and Receipts of each other, and generally as to Acquiescence by the* cestuis que trust.
3. *Appointment of new Trustees.*
4. *Allowance for Trouble and Expenditure.*
5. *Retention and Payment of Legacy Duty.*

II. RELEASES.

1. *As to Releases by Operation of Law.*
2. *As to Releases by Deed.*
   1. *Their Nature and Operation.*
   2. *Who may make and who bound by Releases.*
   3. *To what Demands they extend.*
   4. *General Words restrained by a Recital.*

III. COMPOSITION DEEDS WITH CREDITORS.

1. *Their Nature and Operation in general.*
2. *Effect of Clauses vacating the Instrument, in case all the Creditors do not concur by a certain Time.*
3. *As to Agreements between particular Creditors and the compounding Debtor, at variance with the general Arrangement.*
4. *Effect of a Composition upon Remedies against Third Persons.*

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* It has been deemed that an inquiry into the powers, duties, and responsibilities of trustees, would be not unaptly associated with the title "Releases." The present article embraces many points incidentally connected with, though not directly included in its several sections. It is not offered as a complete dissertation on the subject, but merely as selecting some useful topics for discussion on points respecting which there is a dearth of information in the books.

POWERS, DUTIES, AND RESPONSIBILITIES OF TRUSTEES.

I. AS TO THE POWERS, DUTIES, AND RESPONSIBILITIES OF TRUSTEES.

1. *In regard to Investments, the Deficiency of Securities, and Failure of Bankers and other Agents.*

Trustees, where liable for deficiency in securities.

If executors or trustees properly lay out money, they will not be responsible for the failure or deterioration of the security; *Jackson* v. *Jackson*, 1 Atk. 513; otherwise, if the investment be upon an unauthorized fund. Where the instrument creating the trust is silent or ambiguous as to the nature of the investment, the most prudent course is to invest in Three *per cent.* Annuities, which is the fund in which the Court of Chancery lays out the monies of suitors, on account of its being a permanent or irredeemable stock, or at least redeemable only at par, which hitherto has exceeded the highest market price of the stock. Adhering to this course, the trustee, whatever happens, would be protected; and in no other, under such circumstances, is complete safety to be found. *Ex parte Champion*, 3 B. C. C. 434; *Holland* v. *Hughes*, 16 Ves. 114.

As to *mortgage* investments.

A mortgage is only a proper investment when the trust is to lay out on mortgage, or, which is equivalent, on real security. *Brown* v. *Litson*, 1 P. W. 141. And though Lord Keeper *Harcourt* laid it down, that an executor putting out money on real security was not liable to answer for any loss, it must be remembered, that, at this early period, the public funds were comparatively inconsiderable, and did not afford the same facilities for investment as at present. In the case of *Widdowson* v. *Duck*, 2 Mer. 494, it was contended that a trust to place out money at interest "upon some good and sufficient security," did not authorize an investment on mortgage; but the case did not raise the general question, as a suit in Chancery had been instituted, under which a decree had been made, establishing the trusts of the will, and directing the usual accounts; and Lord *Eldon* ruled, that a trustee or executor *after* a decree was not authorized to lay out money on mortgage without a previous application to the Court. He was therefore ordered to pay into Court the money so laid out.

—Bank stock.

Bank stock cannot be purchased under a trust to invest in Government security; see *Howe* v. Earl of *Dartmouth*, 7 Ves. 152. And in the case of *Trafford* v. *Boehm*, 3 Atk. 440, Lord *Hardwicke* held, that an investment in South Sea stock or Bank stock was not authorized by a trust to

—Personal security.

invest in Government funds, *or other good securities*. It is clear, that an executor or trustee is not justified in laying out money on a *personal* security; *Terry* v. *Terry*, Pre. Ch. 273; *Ryder* v. *Bickerton*, 2 Eden, 149, n.; *S. C.* 3 Swanst. 80, n.; *Vigrass* v. *Binfield*, 3 Madd, 62; a rule which, Lord *Kenyon* has observed, should be rung in the ears of every person who acts in the character of a trustee; see *Holmes* v. *Dring*, 2 Cox, 2. And nothing less than an express and unequivocal authority will exempt him from responsibility in doing so; for it has been held, that a general direction to invest in the funds, "or such other good security as the trustees can procure, and shall think safe," does not confer a power to

lend on personal security. *Wilkes* v. *Steward*, Geo. Coop. 6. And even an express trust to lend upon personal security has been decided not to justify a loan to a *trader* on his bond. *Langston* v. *Ollivant*, Geo. Coop. 33. (As to actions by an executor to recover money lent by him, see *Webster* v. *Spencer*, 3 Barn. & Ald. 360).

Lending to co-trustees.

A trustee lending money to his co-trustee on his promissory note; *Keble* v. *Thompson*, 3 B. C. C. 112; or to a mercantile firm in which his co-trustee is partner; *French* v. *Hobson*, 9 Ves. 103; or to the husband of the lady on whose marriage it was settled; *Collis* v. *Collis*, 2 Sim. 365; of course is answerable: and the fact that in any of these cases the trustee has exposed money of his own to the same hazard, will not discharge him; see *Langston* v. *Ollivant*, Geo. Coop. 33; for, however morally exculpatory this fact may be as to the motive of the act, it does not shew its legal propriety; nor would the circumstance that a profit has accrued to the testator's estate *on the whole*, by lending money on securities of the same nature (which in the case referred to were Jamaica bonds yielding interest at 8*l. per cent.*), exonerate an executor from liability to a loss occasioned by the insolvency of the borrower in any particular instance. *Adye* v. *Feuilleteau*, 1 Cox, 24.

Permitting money to remain out on personal security.

So it is clear, that an executor cannot without danger permit any part of his testator's estate to remain out on personal security, on which he (the testator) had invested it in his lifetime. Thus, in the case of *Lowson* v. *Copeland*, 2 B. C. C. 156, an executor was charged with a sum of 100*l.* lent by the testator on bond, which the executor had not after many years received, though he had it seems made various applications for it. It did not appear whether the debt had become irrecoverable or not. In the case of *Orr* v. *Newton*, 2 Cox, 276, indeed, Lord *Camden* appeared disposed to give to an executor much more extended indulgence; but, in the case before his Lordship, the money neglected to be called in was secured by a mortgage. Had it been a personal security only, the lenient doctrine of this Chancellor (the effect of which went to allow executors to defer the collection of the assets until the money was actually wanted for the purposes of the trust), would not have been admissible, according to more recent as well as prior decisions; for, in the case of *Powell* v. *Evans*, 5 Ves. 839, executors who had allowed 300*l.*, part of the testator's residuary estate, to continue on the bond of two persons as principal and surety, for three years after the testator's decease, when one obligor became bankrupt and the other absconded, were fixed with the loss, *though there was no express trust for conversion and investment, and though the money was not required for the payment of the pecuniary legacies*, which were contingent. Of course, the general indemnity clause will not relieve an executor or trustee who has disregarded an express injunction to call in a debt within a prescribed period. *Mucklow* v. *Fuller*, Jacob, 198.

POWERS, DUTIES, AND RESPONSIBILITIES OF TRUSTEES.

Leaving unsecured debts outstanding.

The observations which have been made with respect to personal securities, will apply with still greater force to mere outstanding debts not secured *at all*, which it is incumbent on an executor or trustee to call in with the utmost dispatch. See *Eagleton* v. *Kingston*, 8 Ves. 467*. And a promissory note not producing interest is of this nature, being merely evidence of a debt and not a security. *Ryder* v. *Bickerton*, 3 Swanst. 80. In a case where certain stock in trade, household furniture, &c., had been by a marriage settlement vested in trustees, who were to permit the husband to possess the property, he paying 800*l.* by eight equal annual instalments, and the trustees received only 250*l.* in the eight years, though they made numerous applications, it was held, that they were bound to make good the deficiency occasioned by the husband's bankruptcy. It was objected that the loss had arisen not from the neglect of the trustees, but from the determination against them of a nice point of law, it having been most unexpectedly decided, that the property in question was in the "order" and "disposition" of the bankrupt. (*Vide* the case as to this point, *Darby* v. *Smith*, *ante*, Vol. 6, p. 216). But the Master of the Rolls observed, that, even supposing the trustees to be right in saying that this was a very doubtful question, and they could not look to the possibility of its being so decided, yet if they had been already guilty of negligence, they must be responsible for any loss in any way to that property; for, whatever might be the immediate cause, the property would not have been in a situation to sustain that loss, if it had not been for their negligence. If they had taken possession of the property, it would not have been in the bankrupt's possession. *Caffrey* v. *Darby*, 6 Ves. 488.

Trustee improperly retaining monies, or selling stock, chargeable with loss from rise in stocks.

A trustee who has retained in his hands a sum of money which his trust required him to invest in Government security, will be liable to make good any loss arising from the subsequent advance of the stocks, or, in other words, to pay the difference between the price of stock at the time when he ought to have invested it, and the period of actual investment. Under this rule, where a sum of money was bequeathed to trustees (who were also appointed executors), to be invested in the public funds, and one of the executors retained the money for several years, he was charged with the price of stock at the time when he first had assets sufficient for investment. *Byrchall* v. *Bradford*, 6 Madd. 235. So, in the case of a trustee improperly *selling out* stock and applying the proceeds to his own use, he is compelled to replace the full amount of stock, notwithstanding any advance of price which may have occurred in the interval. Earl *Powlet* v. *Herbert*, 1 Ves. jun. 297; *Pocock* v. *Reddington*,

* As to an executor carrying on the testator's trade, *vide ante*, Vol. 7, p. 101.

5 Ves. 794. Under any circumstances, a trustee is not permitted to derive an advantage from his improper act, in consequence of the accidental fluctuation of the stock; the *cestui que trust* will have the option of claiming either stock or money, in the exercise of which he will of course be governed by the event: if the stock be lower than when the retention or sale took place, he will choose the money; if higher, the stock. In Earl *Powlett* v. *Herbert*, 1 Ves. jun. 297, the decree directed the trustee to replace stock which he had improperly sold, and that if the purchase were made for a less sum than the misapplied stock had sold for, the trustee should add to the investment such a sum of money as would make up the difference. See also *Harrison* v. *Harrison*, 2 Atk. 121; *Bostock* v. *Blakeney*, 2 B. C. C. 653; *Forrest* v. *Elwes*, 4 Ves. 497; *Pocock* v. *Reddington*, 5 Ves. 794; *Bate* v. *Scales*, 12 Ves. 402.

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Rate of interest payable by trustees.

The rate of interest payable by trustees varies according to circumstances. The distinctions on this subject seem to have been succinctly and accurately stated by Sir *G. F. Hampson*, in his Treatise on the Liabilities of Trustees, p. 71, as follows:—"1st, That trustees culpably negligent in permitting trust-money to continue unproductive, are charged with interest upon the balances in their hands, for the benefit of their *cestuis que trust*, at the rate of 4*l. per cent. per annum.* 2ndly, That, when trustees have been guilty of misconduct by withholding their accounts, employing the trust fund in any manner for their own advantage, or failing to make interest upon it at a higher rate than 4*l. per cent.* when they might have done so, by a due compliance with the express terms of their trust, it is at the option of the *cestuis que trust* whether they shall be charged with interest at the rate of 5*l. per cent. per annum*, or account for the profits which may have been made by the use of the trust property. 3rdly, That sometimes, where trustees have, during a considerable length of time, improperly applied trust-money to their own use, annual rests have been made in their accounts, and compound interest, at the full legal rate, charged against them; and where an express trust for accumulation had been long neglected, half-yearly rests were made in trustees' accounts, and compound interest charged against them upon the balances found." *Raphael* v. *Boehm*, 11 Ves. 107, 111; *S. C.* 13 Ves. 411; *Tebbs* v. *Carpenter*, 1 Madd. 300; see also *Radcliffe* v. *Graves*, 1 Vern. 196; *Lee* v. *Lee*, 2 Vern. 548; *Newton* v. *Bennett*, 1 B. C. C. 359; *Perkins* v. *Baynton*, Id. 375; *Franklyn* v. *Frith*, 3 B. C. C. 433; *Forbes* v. *Ross*, 2 Cox, 111; *Sammes* v. *Rickman*, 2 Ves. jun. 36; *Younge* v. *Combe*, 4 Ves. 101; *Piety* v. *Stace*, Id. 620; *Longmore* v. *Broom*, 7 Ves. 124; *Rocke* v. *Hart*, 11 Ves. 58; *Dornford* v. *Dornford*, 12 Ves. 127; *Ashburnham* v. *Thompson*, 13 Ves. 402; *Crackelt* v. *Bethune*, 1 Jac. & W. 588.

As to making rests against trustees.

Though rests are made against an executor who has improperly employed trust-monies, yet, on the other hand, if he have advanced

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monies of his own on behalf of the testator's estate, he will be allowed interest on such advances only from the time of a balance being struck on the Master's report; for, until then, it cannot be ascertained that the executor has not money in his hands. *Gordon* v. *Trail*, 8 Price, 416.

As to power of changing securities.

Trustees usually have a power to vary securities, which is to be exercised either at their own discretion, or with the consent of the person entitled to the current income (if of competent age); and unless so empowered, they ought not to deal in this manner with the trust funds.

—Not to be exercised unfairly.

The ordinary power to change investments is considered as given with a view to the security of the property, and not to enable the donees to affect the relative rights of the parties beneficially interested; and therefore, where a testator bequeathed the stocks and funds standing in his name in the Bank of England, to trustees, in trust for his wife for life, and at her death to A. absolutely, and he empowered the trustees to transfer the stock to any other Parliamentary funds, and again to change the same as they should think proper:—it was held, that the trustees were not authorized to sell out Long Annuities, and invest the proceeds in the purchase of Three *per cent.* Consols, by which the gift to the wife would have been diminished for the benefit of the ulterior legatee. *Lord* v. *Godfrey*, 4 Madd. 455. The reader will scarcely require to be cautioned against confounding the principle of this case (in which, it will be observed, the bequest was specific) with that which regulates the conduct of executors and trustees under a general trust for conversion, which has been the subject of discussion in a former note. (*Vide ante*, Vol. 6, p. 307).

The Court of Chancery will control the discretion of trustees in regard to this part of their duty, if any attempt be made to exercise the power in a manner palpably mischievous. See *De Manneville* v. *Crompton*, 1 Vesey & Beames, 359.

Previous consent not compensated by *subsequent* approbation.

Where trustees are empowered to lend money, or do any other such act with the consent of a third person, *previous* consent must be obtained, the want of which cannot always be compensated by a *subsequent* approbation. And therefore, where the trustees of a marriage settlement were authorized, with the consent of the wife, if living, to be testified by writing attested by two witnesses, but in case of her death, then in their own discretion, to advance certain Bank Annuities not exceeding 1500*l.*, to the husband; and the trustees advanced the stock without the consent of the wife, who *afterwards*, by a deed attested in the manner required by the power, declared her approbation thereof, the trustees were held to be liable to refund the 1500*l.* stock: Sir *J. Leach*, V. C., observing, "that the actual advance of the money to the husband, who perhaps had spent it, created a pressure upon the judgment of the wife, which gave to her subsequent approbation a very different character from the free consent required by the settlement." *Bateman* v. *Davis*, 3 Madd. 98.

And in a much earlier case, Lord *Hardwicke* held, that, where trustees were to place out a sum of money on security, with the approbation of another person, who was not apprized of the nature of the security until afterwards, her subsequent approbation was not sufficient; but his Lordship thought, (and the idea is important), that the manner in which the money was laid out was so palpably contrary to the trust, being lent on a promissory note without interest, that the trustee would not be excused, *even by obtaining the consent required.* *Ryder* v. *Bickerton*, 3 Swanst. 80, n.

Question, where money raised out of land is lost by insolvency of trustees.

Where a sum once raised out of land has been lost by the insolvency of the trustees, the question sometimes arises, whether the *estate* is exonerated from the charge. In an *Anonymous* case, Salk. 153, a man limited an estate to trustees, for payment of debts and legacies. The trustees raised the whole money, but converted it to their own use; so that the debts and legacies remained unpaid. It was resolved, that the heir should have the land discharged, and the legatees should take their remedy against the trustees; for the estate was debtor for the debts and legacies, but not for the faults of the trustees, and therefore was only liable so long as the debts, &c., should or might be paid; for it was said, that, where the land has once borne its burden, and the money is raised, it is discharged, and the trustees liable. So, in the case of *Juxon* v. *Brian*, Prec. Chan. 143, the Lord Keeper ruled, that, where lands are devised to trustees, to raise money for several purposes, and they raise the money out of the profits, the land is thereby discharged, and the persons concerned must resort to the trustees. So, in the case of *Carter* v. *Barnardiston*, 1 P. W. 505, where a testator devised that his executors should receive the profits of his real estate, for the payment of his debts and legacies, and then over, and it was contended, that the executors should hold over, notwithstanding that they misapplied the profits, Lord Chancellor *Parker* observed, that it would be very strange to say, that, because one of the executors did not apply the rents, as he ought to have done, towards payment of the debts, therefore, he that acted wrongfully should hold over. This would be directly to let a man take advantage of his own wrong, and was the same as to say, that the longer the executors misapplied the profits, the longer they should hold the estate, nay, they should hold it purely because they did wrong. That, therefore, this term or uncertain interest should determine at such time as the executors might have paid the debts, if they had duly applied the rents, &c. And as to the profits misapplied, the creditors must pursue the trustees for such profits. But, in the case of *Harrison* v. *Cage*, 2 Vern. 85, where land was charged by deed with a portion of 500*l.*, and the trustee, after raising the money out of the rents, became insolvent, having given to the portionist a security, by judgment, to pay the money when raised; the Master of the Rolls doubted whether the land was discharged, the words being to raise *and pay;* and the money, though

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raised, not having been paid. But how the case was decided does not appear.

In the late case of *Hutchinson* v. Lord *Massarene*, 2 Ball & Beat. 49, where Lord M. conveyed certain estates to trustees appointed by his creditors, in trust to raise money by mortgage of his estate and perception of rents, for the liquidation of his debts, and one of the trustees failed with money in his hands; Lord *Manners* held, that the loss should fall, not on Lord M., but on the creditors, by whom the trustees were appointed, and whose agents they were. The deed contained a power authorizing the creditors to appoint new trustees.

As to the *custody* of trust property.

In regard to the *custody* of trust property, the general rule is, that a trustee is bound to preserve it with the same care that he reasonably bestows upon his own property, and no more; *Massey* v. *Banner*, 1 Jac. & Walk. 241; which seems to be the fair limit of the responsibility of a merely *honorary* bailee. If, therefore, a trustee be robbed, he is not liable to make good the loss. *Morley* v. *Morley*, 2 Ch. Cas. 2. In accordance with this principle, Lord *Hardwicke* held, that, where an administratrix had delivered goods to her solicitor, in order that they might be tendered to a third person, and the solicitor was robbed, she was not liable. *Jones* v. *Lewis*, 2 Ves. sen. 240.

As to liability on failure of bankers.

The failure of a banker, in whose hands an executor or trustee has, in the regular course of his duty, placed trust-money, will not, it seems, render him responsible for the loss; *Belchier* v. *Parsons*, Amb. 219; *Horsley* v. *Chaloner*, 2 Ves. sen. 85; unless, instead of placing it to a distinct account, he has mixed the money with his own; which circumstance would undoubtedly be a ground for charging him. *Wren* v. *Kirton*, 11 Ves. 377; *Fletcher* v. *Walker*, 3 Madd. 53; *Massey* v. *Banner*, 4 Madd. 413; *S. C.* 1 Jac. & W. 241. In *Churchill* v. Lady *Hobson*, 1 P. W. 243, an executor continuing the trust-monies in the hands of his co-executor, who had been the testator's own banker, was held not to be chargeable. In *Knight* v. Lord *Plymouth*, 3 Atk. 480, a receiver transmitting money through an agent, for the convenience of remittance, was held not to be responsible for the agent's failure. There, the agent was not a banker; but the principle could not be safely acted upon in regard to such a person, at the present day, when the establishment of banks has become more general. In *Rowth* v. *Howell*, 3 Ves. 565, executors were exonerated from liability on account of the failure of a banker who had misappropriated certain negotiable securities which the testator himself had deposited in his hands. It does not appear what time had elapsed since the death of the testator; but it is rather to be inferred that it was not long. The executors were in treaty for a mortgage, which was delayed on account of difficulties in the title; and they, immediately on discovering the misconduct of the banker, brought an action against him, which was defeated by his insolvency and death. In *Adams* v. *Claxton*, 6 Ves. 226, a sum of money was placed at a bank, then in good credit, by the agent of the trus-

tees, pending an appointment of new trustees; and it was held, that the trustee was not liable for the loss incurred by the failure of the bankers.

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In a late case, (not reported), a testator, having directed his trustees to lay out his personal estate in the purchase of lands, they, in the execution of their trust, made a purchase; and, to enable them to complete the contract, sold out stock belonging to the testator's estate, leaving the proceeds in the hands of the bankers, who were the same persons as the testator employed. Some delay unexpectedly arose in the completion of the contract; and in the meantime the bankers became bankrupt. It was attempted to onerate the trustees with the loss; but Sir *J. Leach*, M. R., was of opinion that they were not liable: his Honour observing, that, if trustees were to be responsible for such an accident as this, no respectable person would be induced to undertake the office. *France* v. *Woods*, Rolls, July 23, 1829, MS.

MS. case of *France* v. *Woods*.

In the late case of *Salway* v. *Salway*, 4 Russ. 60, an attempt was made to fix a receiver with a loss arising from the failure of bankers, on the ground, among others, that he had placed the money under the control of other persons, and that interest had been made and proved on it; but, as it appeared that the money had been merely placed to the joint account of the receiver's sureties, in order to insure its due appropriation, and as the receiver himself was ignorant that interest had been made on it, not being aware that the bankers allowed interest on deposit notes; Sir *J. Leach*, M. R., held that the receiver was not, on these accounts, responsible for the loss. The debt, including interest, had been proved against the bankers' estate by one of the sureties.

In the case of *Doyle* v. *Blake*, 2 Scho. & Lef. 231, executors, who eventually were charged with a loss occasioned by the insolvency of an administrator with the will annexed, on the ground of acts performed before renunciation, the effect of which, it was considered, was to make the administrator their agent; Lord *Redesdale* observed, that executors must either wholly renounce, or, if they act to a certain extent as executors, and take upon them that character, they can be discharged only by administering the effects themselves, or by putting the administration into the hands of a Court of equity. The defendants had not taken either of these courses; they put the assets into the hands of the person in question, and procured him to be appointed administrator. His Lordship thought, therefore, that he was to be considered their agent, just as if they had given him a power of attorney. The circumstances of this case were special, and too long to be detailed here.

Executors held chargeable with a loss after renunciation.

2. *How far Executors and Trustees are answerable for the Acts of each other, and generally as to Acquiescence by the* cestuis que trust.

An executor, who merely *permits* his co-executor to possess himself of a fund receivable by them respectively, by virtue of their common office,

Responsibility for the acts of each other.

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—Not answerable for *permitting* money to be received by co-executor.

is not responsible for its application; but if, by any positive *act* or agreement of one executor, money gets into the hands of his companion, they are both answerable. And therefore, where, in an action against two surviving executors, it appeared that they had been joint executors with their mother, who was dead, and who had wasted goods of the testator, of the value of 600*l.*, it was held, that the defendants were not chargeable with this sum; for that, clearly, one executor was not to be charged by the *devastavit* made by his companion. *Hargthorpe* v. *Milforth*, Cro. El. 318. See also *Gill* v. *Attorney-General*, Hardres, 314*.

Aliter, where he does a positive act, placing it at the sole disposal of the co-executor.

On the other hand, (by way of illustration of the second branch of the distinction in question), where two executors joined in a reconveyance of a mortgage, and in a receipt for the mortgage debt, though one only received the money, both were held to be responsible. *Scurfield* v. *Howes*, 3 B. C. C. 90. See also *Murrell* v. *Pitt*, 2 Vern. 570; *Sadler* v. *Hobbs*, 2 B. C. C. 114, overruling *Westley* v. *Clarke*, 1 Eden, 357. So, where a bag of money had been delivered, shortly after the testator's death, to one of three executors, in the presence of the others, and the executor to whom it was delivered handed it over to one of his co-executors, it was held, that he was answerable for the due application of the money by the latter. "The rule," Sir *W. Grant* said, "is, that, if an executor does any act by which money gets into the possession of another executor, the former is equally answerable with the other; *not where an executor is merely passive, by not obstructing the other in receiving it.*" *Langford* v. *Gascoyne*, 11 Ves. 333. See also *Townsend* v. *Barber*, Dick. 356. And it is clear, that, in a Court of equity, an executor cannot examine his co-executor, in order to prove the due application of a sum of money which he has paid over to the latter. *Dines* v. *Scott*, 1 Turn. & Russ. 358. It does not appear, that, in the case of *Langford* v. *Gascoyne*, there was any distinct understanding between the executor who paid, and the executor who received the money, respecting its destination. But, even if there had been, it seems that the result would not have been different; for, an executor cannot divest himself of responsibility, by employing his co-executor to perform an act of their common duty, which might, with equal convenience, have been performed by himself†. Thus, in an action at

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* But a person not originally responsible in regard to the receipt of money by another, may render himself so by his concealment of the fact of its subsequent misappropriation. *Boardman* v. *Morman*, 1 B. C. C. 68.

† But see *Davis* v. *Spurling*, 1 Russ. & Mylne, 66; where Sir *J. Leach*, M. R., seemed to think, that an executor paying over a debt to his co-executor, for a special purpose, as, for the payment of a particular debt, would not be responsible; but the case did not raise the point; for it merely decided, (what might seem to have been too clear to call for de-

law by a bond creditor against an executor, it was held, that the latter could not discharge himself under the plea of *plene administravit*, by shewing that he had paid the money over to his co-executor, for the purpose of satisfying the plaintiff's debt, but who had misapplied it, by retaining the money in satisfaction of a simple contract debt owing from the testator to himself. *Crosse* v. *Smith*, 7 East, 246. Indeed, Lord *Roslyn*, on one occasion, (see *Balchen* v. *Scott*, 2 Ves. jun. 678), discharged an executor, who had proved the will, but had never acted in its execution, and who, on receiving a letter by the post, inclosing a bill of exchange from a debtor of the testator, immediately transmitted it to the acting executor. But the case seems to have been shaken by subsequent decisions; and certainly, the doctrine prevalent in the Court of Chancery, at the time that his Lordship held the Great Seal and Lord *Alvanley*, (see his judgment, in *Hovey* v. *Blakeman*, 4 Ves. 606), presided at the Rolls, was decidedly more favourable to trustees than that which had before or has since obtained there.

Distinction between executors and trustees joining in a receipt.

In a long line of cases we find it laid down as a settled rule, that where two *executors* join in giving a discharge for money, and one of them only receives it, they are both answerable; because, there is no necessity for both to join in the discharge, the receipt of either being sufficient: but if *trustees* join in giving a discharge, and one only receives, the other is not answerable, because his joining in the discharge was necessary. *Aplyn* v. *Brewer*, Pre. Ch. 173; *Fellowes* v. *Owen*, 2 Vern. 504, 515; *Murrell* v. *Cox*, Id. 570; *Churchill* v. Lady *Hobson*, 1 P. W. 241; *Belchier* v. *Parsons*, Amb. 219; *Leigh* v. *Barry*, 3 Atk. 584; *Chambers* v. *Minchin*, 7 Ves. 197; *Brice* v. *Stokes*, 11 Ves. 324. Where the same persons are both executors and trustees, the application of this distinction would of course raise the question, whether the act were done in the one character or the other. And here it may be noticed, that an executor who is appointed a trustee of personalty, cannot assume the executorship and renounce the trust. *Mucklow* v. *Fuller*, Jac. 198. The distinction in question, however, has been somewhat broken in upon, in favour of executors. Lord *Roslyn*, on more than one occasion, unhesitatingly rejected it. See *Adye* v. *Feuilleteau*, 1 Cox, 24; and though Lord *Eldon* has expressed his disapproval of the infringement of the rule, (see 11 Ves. 324), which is

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cision), that, where there were two executors, *one* of whom only had an express power of sale over a real estate, and the proceeds of which were to be applied as part of the personalty, and this executor employed his co-executor, who was an auctioneer, *and was not included in the power*, to sell the estate for him; the auctioneer incurred no responsibility by paying over the purchase-money to his co-executor, whose agent he was.

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enough to induce reluctance on the part of executors to join in *unnecessary* acts, yet, the principle on which the responsibility of executors has been placed in the modern cases, namely, as resulting from negligence in regard to the application of the money, rather than directly from the mere act of conformity in joining in the receipt, deprives the distinction of much of its practical significance. One instance certainly occurs, in which an executor was held not to be liable for a sum of money which he not merely permitted his co-executor to receive, but actually paid over to him. Thus, in *Bacon* v. *Bacon*, 5 Ves. 331, where the circumstances were, that the testator had died at Ipswich, leaving two executors, one residing in the neighbourhood, and the other in London. The latter advanced to the former, who had been the attorney and confidential agent of the testator, 700*l.*, in order to pay debts owing in the neighbourhood. He afterwards produced to his co-executor a book, containing a list, as he alleged, of debts paid, and obtained a further advance of 500*l.* for the like purpose. The executor who paid these sums stated, that he did so because he considered that he was not justified in putting the estate to the expense of paying them himself. The money was misapplied; and it was held, that he was not liable. The sending the money to his co-executor was the most convenient mode of paying the debts, especially as the executor in the country was acquainted with the testator's accounts and affairs. This case is supported by the approbation both of Lord *Eldon*, (see *Chambers* v. *Minchin*, 7 Ves. 195), and Sir *William Grant*, (see *Langford* v. *Gascoyne*, 11 Ves. 331), and has been much relied on in every succeeding attempt to raise an exculpatory argument for executors; but it has seldom happened that their conduct has entitled them to the protection of its principle, the act of confidence in the co-executor not being justified by all the circumstances which contributed to establish its propriety in this instance.

Executor held not responsible for money paid over to his co-executor.

Trustees not liable for mere junction in receipt for monies may become so for negligence as to their application.

And even in regard to trustees who have *necessarily* (and therefore, so far as respects this mere act, *irresponsibly*) concurred in any receipt, it is to be observed, that, if that concurrence has been given with a view to the fund being employed for a purpose not warranted by the trust, or without due *previous* inquiry into the necessity of raising it, or due *subsequent* care respecting its application when raised, the trustees become responsible, not indeed by means of their joining in the receipt, but of the concomitant negligence. Thus, where a testatrix had bequeathed her property in trust to pay some legacies, and then for certain residuary legatees; and after a suit had been commenced for carrying the trusts of the will into execution, one of the executors and trustees who resided in London, applied by letter to the other who was a solicitor in the country, to join in a power of attorney for the sale of some Long Annuities, part of the testatrix's estate, expressing his conviction that it would be advantageous to convert the fund into five *per cents*. The executor in the country complied, the fund was never invested, and the concurring executor

was held to be liable to replace the Long Annuities, Lord *Eldon* adverting to the fact, that the proposed sale and investment were not a due execution of the trust, and that the executor who had concurred in the power of attorney took no steps to ascertain what use was made of the power, what became of the annuities sold, and whether they were applied in any manner to the trusts of the will. *Chambers* v. *Minchin*, 7 Ves. 186. The rule acted upon in this and other cases, though often operating with extreme severity upon individuals, seems indispensable to the protection of trust-property. If trustees were at liberty to parcel out the responsibility among each other, the security derived from combining in the trust persons of probity, intelligence, and wealth, some selected for one quality, and some for another, would be greatly impaired.

Ordinary indemnity clauses not restrictive of liability.

And the ordinary indemnity clauses have scarcely any operation in restricting liability for this kind of negligence. Lord *Northington*, in one instance (see *Westley* v. *Clarke*, 1 Eden, 357), certainly ascribed some potency to a clause of indemnity, as exempting executors from responsibility for monies placed by them at the disposal of their co-executor; but the soundness of the decision has been questioned (see 2 Bro. Ch. Cas. 117), and undoubtedly, so far as it leans on this circumstance, it is overruled by subsequent adjudications. Thus, where a testator devised real estate to trustees upon trust for sale, and the monies arising therefrom were to be invested in Government or real securities, upon certain trusts in the will mentioned: the will contained a proviso, that the trustee or trustees for the time being should not be answerable or accountable for any trust-money further than each person for what he or she should respectively actually receive, and not the one for the other or others of them, but each person for his or her own acts, receipts, and defaults only, and not for any loss that might happen by defect in title or value of any fund or security in or upon which any trust-monies should be invested, or by the failure of any banker or bankers with whom any trust-monies should be lodged, nor for any involuntary loss whatsoever. Certain parts of the estates of the testator were sold by the trustees, one of whom received the purchase-money and retained it in his hands; the co-trustees did not concern themselves about the matter until two years afterwards, when they called on him to invest the money in his hands on security; but being unable so to do, he executed a mortgage of some real estate for securing the repayment, and also a warrant of attorney. The trustee became bankrupt, and the testatrix's estate sustained a loss of nearly 400*l.*, for which it was held, on a bill filed by one of the *cestuis que trust*, that the co-trustees were responsible. *Bone* v. *Cook*, M'Clel. 168.

So, where, on a marriage, a sum of stock was settled for the separate use of the wife for life, remainder for the husband for life, remainder for their children, with power to change securities with the consent of the wife, and the deed contained a declaration that the trustees should be charged only

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with such monies as they should actually receive, notwithstanding their joining in any receipt, and that one of them should not be answerable for the others. The dividends on the stock being reduced, one of the trustees, in whom the husband and wife principally confided, and who, with his partners, was their solicitor, informed his co-trustees that he had an opportunity of investing the property in a mortgage at five *per cent.*, and, with the consent of the husband and wife, requested his co-trustees to execute a power of attorney to enable him to sell the stock. The co-trustees, without inquiring into the nature of the proposed security, executed the power. The trustee sold the stock, but instead of investing the proceeds retained them in his hands, paying the dividends, or rather a sum equal to them, to the *cestuis que trust*, who on one occasion applied to him to know if he had procured an eligible mortgage, when the trustee admitted that he had not, but expressed his hope that he should soon be able to do so. The trustee absconded, and the remaining trustees, on a bill filed by the husband and wife, were decreed to replace the stock. *Hanbury* v. *Kirkland*, 3 Simons, 265.

Remarks upon indemnity clauses.

The little attention paid to indemnity clauses will appear upon examination to be consistent with the general principle to which the responsibility of trustees in cases of this description has been already referred, namely, as flowing not from the act of joining in the receipt, but from the neglect to ascertain the necessity for raising, or seeing to the application when raised of, the fund in question. In this point of view the ordinary clauses are merely expressive of, and do not enlarge the general rule, though perhaps this construction of them scarcely comports with that principle of interpretation, which always aims at a construction that will render a clause operative, rather than one which makes it nugatory. However this may be, the most cursory glance at the modern cases will shew that indemnity clauses have been estimated so lightly as to make the existence or absence of them a circumstance scarcely sufficient to attract the observation of the reporter—forming a singular contrast to the importance which is attached to such clauses by the unprofessional public. Few persons will undertake trusts when indemnity provisions are omitted, and too many are induced by their misplaced confidence in them to forego those precautions which prudence and honesty dictate, as the proper rule of the conduct of men who are dealing with property not their own, of which they have undertaken to be the vigilant and jealous guardians.

Co-trustee not liable for funds not wanted, but eventually applied to proper purposes.

But though one trustee may in excessive confidence have placed at the disposal of a co-trustee funds which were not wanted at the time, there being monies already in his hands applicable to the purpose; yet, if the latter apply the new instead of the old fund, the confiding trustee will be exonerated to the extent of this application. Thus, where three executors, on the representation of the fourth, who was the managing executor, that a fund was wanted for the payment of debts, executed and deli-

vered to him a power of attorney for the sale of stock, it was held, that the executors were chargeable for so much of the fund as he did not apply to the destined purpose, but were not liable for what he did apply, though he had in his hands another sum of money belonging to the trust estate, which he had acquired without the act of, and therefore without bringing any responsibility upon, the co-trustees. Lord *Eldon* admitted that no moral blame attached to the executors, but merely that degree of negligence which was frequently observed in very honourable men. It was incumbent on them, however, to have made inquiry as to the application of the fund already in the hands of the executor, before they placed more money at his disposal. Lord *Shipbrooke* v. Lord *Hinchinbrooke*, 11 Ves. 252; 16 Ves. 477. See also *Underwood* v. *Stevens*, 1 Mer. 712. The doctrine of this case of course would only apply where the co-trustee was not responsible for both funds.

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Where the act producing the loss has been done at the request, or with the concurrence of a person who has a beneficial interest in the property, and possesses a full knowledge of the circumstances, the trustees are exonerated to the extent of the interest of such party. Thus, where a testator devised to A. and B. freehold and leasehold estates upon trust to sell, and directed the monies arising from the sale to be placed out on Government or real security, in trust for his niece E., while unmarried; and, on her marriage, in trust for her absolutely; with power to make a settlement on her and her issue; and he directed that one trustee should not be answerable for the acts of the others. E. married D., upon which occasion, under the power in question, a settlement was made on E. for life, with remainders to the husband for life, and to their issue. Shortly afterwards, A. and B., with the approbation of D., sold and conveyed a freehold estate, part of the testator's property, to a purchaser, both joining in the receipt for the consideration-money. B. died insolvent, having, it appeared, received the money without investing it. Both the trustees were held to be responsible, except so far as concerned the interest of D., who was bound by the part he had taken in the transaction. *Brice* v. *Stokes*, 11 Ves. 324.

Effect of concurrence of *cestui que trust.*

If, however, the concurring *cestui que trust* was at the time ignorant of any circumstance, which, if known, might have materially influenced him in giving or withholding that concurrence, he will not be bound. Thus, where property had been bequeathed to A. and B. in trust to sell, and invest the produce for the benefit of C., D., and E. The trustees were also executors, and the will contained the usual indemnity clause. A. was the acting trustee, B. very reluctantly accepting the trusts at the urgent solicitation of the legatees; he rarely acted, but joined in executing two powers of attorney for the sale of stock, at the joint request of A., his co-trustee, and C., one of the parties beneficially interested, on the representation that the sale was necessary for the purpose of paying le-

Cestui que trust concurring in ignorance, not bound.

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gacies. A. afterwards informed B. that the legacies had been paid, and the residue invested. It afterwards turned out, that a considerable balance was in the hands of A. at the time of the sales, but this fact was not known either to A. *or D.* Sir *W. Grant*, M. R., held, that as it appeared that the parties beneficially interested knew nothing of the balance in A.'s hands at the time of the sale, their concurrence in the sale was not material; and that, even if they had known it, their consent that the stock should be sold for the purposes of the will did not imply a consent to the executors applying it to their own benefit; but, as it appeared that part of the stock had been duly applied, his Honour gave them the benefit of this application, notwithstanding the sum previously in their hands, "according to the lenient doctrine of the Lord Chancellor in Lord *Shipbrooke* v. Lord *Hinchinbrooke*." *Underwood* v. *Stevens*, 1 Mer. 712. See also *Ryder* v. *Bickerton*, 3 Swanst. 80, n.

Another instance of the tenderness of the Court in its construction of the acts of persons possessing defective or erroneous information, is afforded by the case of *Adams* v. *Clifton*, 1 Russ. 298, where certain stock in the funds having been purchased by the executors and trustees of a will to answer a legacy, the executrix of the surviving executor and trustee executed a power of attorney for the sale of the stock, the proceeds of which were paid to the heir-at-law of the late trustee, under the erroneous impression that he was in that character the personal representative of the trustee. The legatee, for upwards of ten years, received the dividends on her legacy from the heir-at-law, and uniformly treated him as her debtor, on one occasion pressing him for security, and executing a letter of licence to him as one of his creditors, without ever making any application to the executrix. The legatee, however, was not aware that the legacy had ever been invested by the executors in the public funds; and on this ground it was held, that she was not precluded by her dealings with the heir-at-law from making her claim on the executrix, the heir-at-law having become insolvent.

4. *Allowance for Trouble and Expenditure.*

Trustees allowed no compensation for trouble.

The office of a trustee is honorary; and he is not allowed any compensation for his personal diligence and trouble in the trust, however onerous its duties may have been. *Godfrey* v. *White*, Finch, 362; *Robinson* v. *Pett*, 3 P. W. 251; *Brocksopp* v. *Barnes*, 5 Madd. 90. And so far was this principle carried at an early period, that an agreement for compensation to a trustee was considered to be one which equity would not enforce or recognise. *Gould* v. *Fleetwood*, 3 P. W. 252, n. But this inconvenient doctrine was considerably relaxed so long ago as the time of Lord *Hardwicke*, who thought the contract might be sustained, if a trustee comes in a fair and open manner, and tells the *cestui que trust* that he will not act in such a troublesome and burdensome office, unless

the *cestui que trust* will give him a further compensation, over and above the terms of the trust, and it is contracted for between them. See *Ayliffe* v. *Murray*, 2 Atk. 60.

Contracts for compensation valid.

At the present day, it is clear that such an agreement would be valid. Indeed, in *Marshall* v. *Holloway*, 2 Swanst. 453, it was referred to the Master to settle an allowance to be made to a trustee, as well for his future labour in the trust, as for the past time that he had been engaged therein, it being represented by the co-trustees, that the circumstances of the estate required the application of a great portion of time; and that they could not undertake the trust without the aid of the person in question, who had had the confidential management of the testator's affairs in his lifetime; and that he had accepted the trust under the assurance that such an allowance would be applied for. But the general rule of the Court is, not to make a retrospective allowance; and the answer given to a trustee claiming it on the footing of extraordinary services is, that he should have made out a special case to the Court, before he accepted the trust. *Brocksopp* v. *Barnes*, 5 Madd. 90.

As to allowances, by way of commission, to executors in India, see *Chatham* v. Lord *Audley*, 4 Ves. 72; *Hovey* v. *Blakeman*, Ib. 596; *Freeman* v. *Fairlie*, 3 Mer. 24; *Wilkinson* v. *Wilkinson*, 2 Sim. & Stu. 237; *Sheriff* v. *Axe*, 4 Russ. 33.

Allowance to trustees for salaries.

But a trustee is at liberty to employ proper assistants, at the expense of the estate; and the salary of a bailiff or accomptant, or any other agent whose services are fairly required, would be allowed him, under the title of "just and reasonable allowances," which, in taking the accounts of trustees, the Master is always directed to make to them. *Henderson* v. *M'Iver*, 3 Madd. 275; *Stuart* v. *Hoare*, 2 B. C. C. 663; *Forrest* v. *Elwes*, 2 Mer. 68. But, if he chooses to perform the duty himself, he cannot, unless by special contract, as already mentioned, claim any allowance. See *Bonithon* v. *Hockmore*, 1 Vern. 316. A bill of costs paid to a solicitor for necessary law charges is, of course, allowed to an executor or trustee; *Macknamara* v. *Jones*, Dick. 587; and generally, all reasonable expenses incurred by him in the execution of his trust. *Hethersell* v. *Hales*, 2 Rep. Ch. 158. In a late case, trustees were allowed the salary paid to a collector of rents, although a yearly sum of five guineas a-piece was bequeathed to them for their trouble, as the property consisted of fifty houses, of which thirty-four were let at weekly rents. *Wilkinson* v. *Wilkinson*, 2 Sim. & Stu. 237.

As to suits by executors and trustees to obtain the direction of the Court.

The present section should not be concluded without a remark as to the right of executors and trustees to institute suits, in order to obtain the direction of the Court in regard to points of difficulty occurring in the execution of their trust. The rule of equity certainly allows greater latitude than will, in general, be used by a conscientious trustee, whose inquiry will be, not whether he is legally justified in the institution of a suit, and is secure from the risk of being rendered liable to costs on his

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taking such a step, but whether his protection imperatively calls for a measure which must inflict injury upon the persons beneficially interested. But though the Court will go far (as it ought) in justifying trustees, who are driven by the conflicting claims of parties to seek its direction, it will not sanction the conduct of a trustee, who, under the pretence of self-protection, involves the trust-property in a suit, for the purpose of raising a question on which no rational doubt could be entertained; still, however, it will not punish with equal and undistinguishing severity the blunders of ignorance and the more culpable, though often not more mischievous, machinations of fraud. Thus, in a late case, where trustees refused to pay to the assignee of a bankrupt legatee a legacy which was reversionary at the time of the bankruptcy, but had since fallen into possession, on the ground that the bankrupt had set up a claim to it; Sir *J. Leach*, M. R., refused to give the defendants their costs; but, as their refusal appeared to arise from ignorance, and not from any improper motive, his Honour did not order them to pay the plaintiff's costs. *Knight* v. *Martin*, 1 Russ. & Mylne, 70. See farther, on this subject, Beames on Costs; Hovenden on Frauds; Madd. Ch. Pract.

5. *As to the Appointment of New Trustees.*

Appointment of new trustees.

Another branch of the duty of trustees relates to the supplying of vacancies made in their body by death, incapacity, or secession*. An authority to substitute new trustees, in these events, must be derived from an express provision: for trusts are not in their nature susceptible of delegation; and trustees have no power inherent in their office to transfer its duties and functions to others. A trustee may, indeed, divest himself of the trust property, by conveying it to a third person, who thereby acquires a degree of fiduciary responsibility in relation to it; but the liability of the alienor (assuming, of course, that the *cestuis que trust* have not bound themselves by assent,) remains undiminished: which rule is equally applicable, whether the person to whom the trust estate is conveyed be a co-trustee or a stranger. *Wilkinson* v. *Parry*, 4 Russ. 274, stated *post*, p. 376. See also *Chalmer* v. *Bradley*, 1 Jac. & W. 68.

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Trustees not discharged by a nugatory act of new appointment.

It is, therefore, especially incumbent, as well on trustees who continue in, as on those who retire from office, to see that the powers under which the new trustees are appointed are duly complied with; for so far only as this is done, is the act exonerative from any existing liability.

Trustee cannot relinquish his

And here it is important to observe, that the powers, as usually framed, require that a new trustee should be substituted for one who retires, and do

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* The remarks here made are supplementary to those in a former title on the same subject, to which the reader is referred. *Vide ante*, Vol. 6, p. 488.

not enable one of several trustees to relinquish the trust to his co-adjutors. Thus, where a marriage settlement of stock reserved a power to the wife during her life, and after her death to the guardians of the children, to appoint a new trustee in the place of any who should die or desire to retire—N., one of the trustees, being desirous to retire, S., a new trustee, was appointed, who, after he had accepted the trust by executing the deed, but before he had acted, became also desirous to retire; when a deed was executed by the wife, appointing P., the original continuing trustee, *as the sole trustee;* S. was made a party to, but did not execute this deed; N., the original retiring trustee, transferred the stock to P., the original continuing trustee, alone, who afterwards sold it, and applied the proceeds in a manner not authorized by the trust. In a suit against N. by the children of the marriage, it was objected that S. was implicated in the breach of trust, and therefore ought to have been made a party in the suit; but the Master of the Rolls overruled this objection, referring to the answer of N., in which it was admitted that S. had retired from the trust; and stating, that it would have been an imprudent act in S., if he had executed the deed appointing the sole trustee, and that, under the circumstances, there could be no relief against S. With respect to the defendant (the original trustee), his Honour observed—"By the terms of the trust deed, under which he has acted, he was bound, upon declining the trust, to transfer the trust property to the continuing trustee, *and a new trustee to be appointed in his place;* and nothing could relieve him from that obligation but the consent of all parties interested under the trust. It was not possible to obtain such consent here, because there were infants who were not capable of consenting, and, therefore, could not be deprived of that security, which they derived from having the trust property, upon N.'s declining the trust, confided to the care and integrity of two new trustees instead of one. I am compelled, therefore, though with reluctance, to declare my opinion, that N. as well as P. is liable, as it regards the infants, for any loss to their shares of the property, which may be the consequence of the transfer of the stock by P." *Wilkinson* v. *Parry*, 4 Russ. 274.

trust to a co-trustee.

One important question connected with trustees' powers is, whether they are competent to the discharge of their functions after the happening of vacancies, for which provision is made in a power of new appointment. Some reasoning in support of the affirmative conclusion will be found elsewhere. (*Vide ante*, Vol. 6, p. 489). The point was adverted to in the case of *Doe* d. *Read* v. *Godwin*, 1 Dowl. & Ryl. 259; where, in an act of Parliament, enabling five trustees to dispose of certain houses by lottery, it was enacted, that, if any of the trustees should die before the drawing of the lotteries, and the conveyance of the prizes, the survivors or survivor should and were thereby required to appoint a new trustee or new trustees. It was objected to the validity of a conveyance by four sur-

Whether trustees are competent to act after vacancies.

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viving of the five trustees, that it was imperative on the survivors to fill up the vacancy occasioned by the death of the deceased trustee, before they could execute a conveyance; but the objection was overruled. Lord Chief Justice *Abbott* observed, that the directions of the statute, in this respect, were analogous to the powers contained in a private settlement to fill up the vacancies occasioned by death in the execution of the trust; his Lordship considering, that this construction was fortified by a subsequent statute, amending the act in question, in which it was declared, that, if any fortunate tickets, drawn in any of the lotteries, should not be produced to the said five trustees, *or the survivors or survivor of them*, or such other persons as might be appointed in pursuance of the therein recited act, then the said five trustees, *or the survivors or survivor* of them, should immediately advertise, &c. Mr. Justice *Bayley* was of opinion that the clause did not apply, unless the trustee's death had taken place before the drawing of the lotteries, which had not been proved; but, at all events, he was of opinion that *this was a directory clause only*, and that the conveyance clearly operated upon the legal title, to which only, in a Court of law, they could pay any regard. Mr. Justice *Best* concurred on both points.

Remarks upon *Doe* v. *Godwin*.

This case, it must be admitted, *decided* nothing more than that the conveyance by the surviving trustees carried the legal title, though it indicates the opinion of two of the learned bench, that clauses of this nature are directory only.

Acts of legal dominion not restrained in equity, on account of power of new appointment not having been exercised.

It seems, that the exercise of acts of dominion by the surviving trustees or trustee, or his representatives, by virtue of the legal title, will not be restrained in equity, on the mere ground that a power of supplying vacancies in the trust has been allowed to lapse, without any attempt to exercise it. Thus, in the case of The *Attorney-General* v. Bishop of *Litchfield*, 5 Ves. 825, where an advowson had been devised to eight persons, in trust, to present a clerk as often as the church should be void, with a direction that the last three survivors should make choice of new trustees; the whole died without exercising the power; and Lord *Rosslyn* refused to restrain by injunction a presentation by the heir of the surviving trustee under the legal title. Of course, the power of appointing new trustees was gone, by the neglect of the three to exercise it.

Whether power can be exercised before trustees are reduced to specified number.

And this serves to introduce the observation, that though it seems pretty evident that such a power reserved to surviving trustees, *when they are reduced to a certain number*, is not exercisable by any less number of survivors, *i. e. after* they have, in the progress of reduction, passed the specified number; yet, it is not equally evident whether the power is capable of being exercised *before* they reach that number. A case exactly applying to this point, (though in a book of equivocal authority), is *Doe* d. *Dupleix* v. *Roe*, 1 Anst. 86; where a deed of conveyance of a Wesleyan chapel to twenty-five trustees, contained a clause directing, that,

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when by death or otherwise, the number of the trustees should be reduced to fifteen, then the remaining fifteen trustees, or the majority of them, should proceed to elect, &c., so as to make up the complement of twenty-five. When the number had been reduced to seventeen, twelve of that number, (the other five dissenting), elected eight new trustees; and it was held that this was within the scope of their power. The Chief Baron, (*Eyre*), observed—"The general intention of the trust deed clearly is, that there shall be a succession of trustees on the death of those originally created; and the period of their being reduced to fifteen is that at which they are *compellable* to fill up their numbers; *not but what they may do it sooner*"*.

This is certainly the most convenient construction; for, otherwise, the occurrence of two deaths almost simultaneously might place it out of the power of the donees to make the new appointment.

As to the discharge of retiring trustees.

It rarely happens that trustees who retire under a power can have a complete discharge for past transactions; as the having recourse to the power supposes the want of an absolute interest in the *cestuis que trust*, which would alike incapacitate them from releasing the trustee; but the new appointment, if effectual, will prevent him from incurring further liability; and, as the evidence of exemption from continuing liability is the instrument effecting such new appointment, it seems proper that he should have a counterpart.

Proceedings of the Court of Chancery in regard to the appointment of new trustees.

The Court of Chancery will interfere to prevent the power of appointing new trustees from being exercised in an improper manner, and it will not permit the power to be exercised at all by the donee, pending a suit for establishing the trusts, except under the direction of the Court; *Webb* v. Earl of *Shaftesbury*, 7 Ves. 480; or without ascertaining by the usual reference to the Master the fitness of the new nominees. ——— v. *Robarts*, 1 Jac. & W. 251. If the newly appointed trustee is by the terms of the instrument creating the trust to have a commission for his trouble, the Court would be, and the donee ought to be the more careful in the selection of a proper person, always remembering that powers of this description are given for the benefit of the estate, and not of the individuals nominating or nominated. See *Webb* v. Earl of *Shaftesbury*, 7 Ves. 480. Gross misconduct, incapacity from infirmity or absence, or refusal to act, are, in general, the grounds upon which the Court will remove trustees. See *Travell* v. *Danvers*, Finch, 380; *Moggeridge* v. *Grey*, Nels. 42; City of *Coventry* v. *Attorney-General*, 2 B. P. C. 236; *Benett* v. *Honywood*, Amb. 710; *Uvedale* v. *Ettrick*, 2 Ch. Cas. 26; *Millard* v. *Eyre*, 2 Ves. jun. 94; *Buchanan* v. *Hamilton*, 5 Ves. 722; Willis on Trustees, 199. Mar-

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* Some persons enrol deeds of conveyance to new trustees of dissenting chapels, or other charitable institutions, conceiving that they are within the stat. 9 Geo. 2, c. 36; but the notion is quite groundless. That statute only applies to instruments *devoting* land to charity.

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riage with a foreigner has been held to be a ground for removing a female trustee. *Lake* v. *De Lambert*, 4 Ves. 592. In ——— v. *Osborne*, 6 Ves. 455, on an application by a devisee in trust, against whom a creditor's suit had been instituted, for a reference to the Master to appoint a new trustee and settle a release, on the ground that he had never acted, and was of advanced age, Lord *Eldon* referred it to the Master to look through the proceedings, to see whether the defendant remained accountable for any acts done by him as trustee, and if not, to settle a release. It may be observed, that where new trustees are appointed under a suit, the Court will not insert a clause in the conveyance enabling the new trustees to appoint others in their stead, there being no provision to that effect in the trust-deed. *Bayley* v. *Mansell*, 4 Mad. 226. (See further, as to the appointment of new trustees by the Court of Chancery, the recent act of Parliament, stated *ante*, Vol. 6, p. 440).

5. *Retention and Payment of Legacy Duty.*

Legacy duty.

The legacy duty was first imposed by stat. 20 Geo. 3, c. 28, and was increased and subjected to various regulations by several succeeding acts. (23 Geo. 3, c. 58; 29 Geo. 3, c. 51; 36 Geo. 3, c. 52; 44 Geo. 3, c. 98; 45 Geo. 3, c. 28; 48 Geo. 3, c. 149). The present rate of duty was fixed by the stat. 55 Geo. 3, c. 184, which contains the following clause:—

Legacies and Successions to Personal or Moveable Estate, upon Intestacy.

£ *s. d.*

Amount of duty where testator died before or on 5th of April, 1805.

I. Where the testator, testatrix, or intestate, died before or upon the 5th day of April, 1805—

For every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards, given by any will or testamentary instrument of any person who died before or upon the 5th day of April, 1805, out of his or her personal or moveable estate, and which shall be paid, delivered, retained, satisfied, or discharged, after the 31st day of August, 1815.

Also, for the clear residue, (when devolving to one person), and for every share of the clear residue, (when devolving to two or more persons), of the personal or moveable estate of any person who died before or upon the 5th day of April, 1805, (after deducting debts, funeral expenses, legacies, and other charges first payable thereout), whether the title to such residue, or any share thereof, shall accrue by virtue of any testamentary disposition, or upon a partial or total intestacy; where such residue, or share of residue, shall be of the amount or value of 20*l.* or upwards, and where the same shall be paid, delivered, re-

	£	s.	d.
tained, satisfied, or discharged, after the 31st day of August, 1815.			
Where any such legacy, or residue, or share of such residue, shall have been given, or have devolved, to or for the benefit of a brother or sister of the deceased, or any descendant of a brother or sister of the deceased, a duty at and after the rate of 2*l.* 10*s.* *per centum*, on the amount or value thereof	2	10	0
Where any such legacy, or residue, or share of such residue, shall have been given, or have devolved, to or for the benefit of a brother or sister of the father or mother of the deceased, or any descendant of a brother or sister of the father or mother of the deceased, a duty at and after the rate of 4*l.* *per centum*, on the amount or value thereof ...	4	0	0
Where any such legacy, or residue, or share of such residue, shall have been given, or have devolved, to or for the benefit of a brother or sister of a grandfather or grandmother of the deceased, or any descendant of a brother or sister of a grandfather or grandmother of the deceased, a duty at and after the rate of 5*l.* *per centum* on the amount or value thereof	5	0	0
And where any such legacy, or residue, or share of such residue, shall have been given or have devolved, to or for the benefit of any person, in any other degree of collateral consanguinity to the deceased than is above described, or to or for the benefit of any stranger in blood to the deceased, a duty at and after the rate of 8*l.* *per centum* on the amount or value thereof	8	0	0

LEGACY DUTY.

II. Where the testator, testatrix, or intestate, shall have died after the 5th day of April, 1805—

Amount of duty where testator died after 5th of April, 1805.

For every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards, given by any will or testamentary instrument, of any person who shall have died after the 5th day of April, 1805, either out of his or her personal or moveable estate, or out of or charged upon his or her real or heritable estate, or out of any monies to arise by the sale, mortgage, or other disposition of his or her real or heritable estate, or any part thereof, and which shall be paid, delivered, retained, satisfied, or discharged, after the 31st day of August, 1815:

Also, for the clear residue, (when devolving to one person), and for every share of the clear residue, (when devolving to two or more persons), of the personal or moveable estate of any person who shall have died, after the

		£	s.	d.
LEGACY DUTY.	5th day of April, 1805, (after deducting debts, funeral expenses, legacies, and other charges first payable thereout), whether the title to such residue, or any share thereof, shall accrue by virtue of any testamentary disposition, or upon a partial or total intestacy; where such residue, or share of residue, shall be of the amount or value of 20*l.* or upwards, and where the same shall be paid, delivered, retained, satisfied, or discharged after the 31st day of August, 1815.			
	And also, for the clear residue, (when given to one person), and for every share of the clear residue, (when given to two or more persons), of the monies to arise from the sale, mortgage, or other disposition of any real or heritable estate directed to be sold, mortgaged, or otherwise disposed of, by any will or testamentary instrument, of any person who shall have died after the 5th day of April, 1805, (after deducting debts, funeral expenses, legacies, and other charges first made payable thereout, if any), where such residue, or share of residue, shall amount to 20*l.* or upwards, and where the same shall be paid, retained, or discharged, after the 31st day of August, 1815.			
	Where any such legacy or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of a child of the deceased, or any descendant of a child of the deceased, or to or for the benefit of the father or mother, or any lineal ancestor of the deceased, a duty at and after the rate of 1*l. per centum* on the amount or value thereof	1	0	0
	Where any such legacy, or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of a brother or sister of the deceased, or any descendant of a brother or sister of the deceased, a duty at and after the rate of 3*l. per centum* on the amount or value thereof	3	0	0
	Where any such legacy, or residue, or any share of such residue, shall have been given or have devolved to or for the benefit of a brother or sister of the father or mother of the deceased, or any descendant of a brother or sister of the father or mother of the deceased, a duty at and after the rate of 5*l. per centum* on the amount or value thereof.	5	0	0
	Where any such legacy or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of a brother or sister of a grandfather or grandmother of the deceased, or any descendant of a brother or			

LEGACY DUTY.

	£	s.	d.
sister of a grandfather or grandmother of the deceased, a duty at and after the rate of 6*l. per centum* on the amount or value thereof	6	0	0
And where any such legacy or residue, or any share of such residue, shall have been given, or have devolved to or for the benefit of any person, in any other degree of collateral consanguinity to the deceased than is above described, or to or for the benefit of any stranger in blood to the deceased, a duty at and after the rate of 10*l. per centum* on the amount or value thereof.....	10	0	0

And all gifts of annuities, or by way of annuity, or of any other partial benefit or interest, out of any such estate or effects as aforesaid, shall be deemed legacies within the intent and meaning of this schedule.

And where any legatee shall take two or more distinct legacies or benefits, under any will or testamentary instrument, which shall together be of the amount or value of 20*l.*, each shall be charged with duty, though each or either may be separately under that amount or value.

Exemptions.

Legacies and residues, or shares of residue, of any such estate or effects as aforesaid, given or devolving to or for the benefit of the husband or wife of the deceased, or to or for the benefit of any of the royal family.

And all legacies which were exempted from duty by the act passed in the 39th year of his Majesty's reign, c. 73, for exempting certain specific legacies given to bodies corporate, or other public bodies, from the payment of duty.

The act of 39 Geo. 3, c. 73, here referred to, exempts books, prints, pictures, gems, coins, medals, and other specific articles bequeathed, in order to be preserved.

The regulations now in force are principally contained in stat. 36 Geo. 3, c. 52, of which the following is an abstract:— Stat. 36 Geo. 3, c. 52.

An Act for repealing certain Duties on Legacies and Shares of Personal Estates, and for granting other Duties thereon in certain Cases.—[26th April, 1796.]

Sections 1 to 6, fix the amount of duty, &c.

Sect. 6, enacts, That the duties hereby imposed shall, in all cases in which it is not hereby otherwise provided, be accounted for, answered, and paid, by the person or persons having or taking the burthen of the execution of the will or other testamentary instrument, or the administration Duties to be paid by executors or administrators, on retaining or paying legacies.

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of the personal estate of any person deceased, upon retainer for his, her, or their own benefit, or for the benefit of any other person or persons, of any legacy, or any part of any legacy, or of the residue of any personal estate, or any part of such residue, which he, she, or they shall be entitled so to retain, either in his, her, or their own right, or in the right or for the benefit of any other person or persons; and also upon delivery, payment, or other satisfaction or discharge whatsoever, of any legacy, or any part of any legacy, or of the residue of any personal estate, or any part of such residue, to which any other person or persons shall be entitled; and in case any person or persons having or taking the burthen of such execution or administration as aforesaid, shall retain for his, her, or their own benefit, or for the benefit of any other person or persons, any legacy, or any part of any legacy, or the residue of any personal estate, or any part of such residue, which such person or persons shall be entitled so to retain, either in his, her, or their own right, or in the right or for the benefit of any other person or persons, and upon which any duty shall be chargeable by virtue of this act, not having first paid such duty, or shall deliver, pay, or otherwise howsoever satisfy or discharge any legacy, or any part of any legacy, or the residue of any personal estate, or any part thereof, to which any other person or persons shall be entitled, and upon which any duty shall be chargeable by virtue of this act, having received or deducted the duty so chargeable, then and in every of such cases, the duty which shall be due and payable upon every such legacy, and part of legacy and residue, and part of residue respectively, and which shall not have been duly paid and satisfied to his Majesty, his heirs and successors, according to the provisions of this act, shall be a debt of such person or persons having or taking the burthen of such execution or administration as aforesaid, to his Majesty, his heirs and successors; and in case any such person or persons so having or taking the burthen of such execution or administration as aforesaid, shall deliver, pay, or otherwise howsoever satisfy or discharge any such legacy or residue, or any part of any such legacy or residue, to or for the benefit of any person or persons entitled thereto, without having received or deducted the duty chargeable thereon, (such duty not having been first duly paid to his Majesty, his heirs or successors, according to the provisions herein contained), then and in every such case such duty shall be a debt to his Majesty, his heirs and successors, both of the person or persons who shall make such delivery, payment, satisfaction, or discharge, and of the person or persons to whom the same shall be made.

If duty be not paid before legacies are retained by executors, or discharged, they having deducted it, the amount to be a debt from them to his Majesty; and if they pay legacies without deducting the duty, it shall be a debt from both parties.

Sect. 7, altered by stat. 45 Geo. 3, c. 28, *post*, p. 391.

Sect. 8. That the value of any legacy given by way of annuity, whether payable annually or otherwise, for any life or lives, or for years determinable on any life or lives, or for years or other period of time, shall be calculated, and the duty chargeable thereon shall be charged, according to the

The value of annuities, and the duty, to be calculated according to the

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tables in the schedule hereunto annexed; and the duty chargeable on such annuity shall be paid by four equal payments, the first of which payments of duty shall be made before or on completing the payment of the first year's annuity, and the three others of such payments of duty shall be made in like manner successively, before or on completing the respective payments of the three succeeding years' annuity respectively; and the value of any such annuity, if determinable upon any contingency besides the death of any person or persons, shall be calculated without regard to such contingency: Provided always, that if any such annuity shall determine by the death of any person, before four years' payment of such annuity shall become due and payable, then and in such case the duty shall be payable in proportion only to so many of the payments of the said annuity as actually accrued and became due and payable; and in case any such annuity shall at any time determine upon any other contingency than the death of any person or persons, then and in such case, not only all payments of duty which would otherwise become due after the happening of such contingency, if any such would become due, shall cease; but it shall be lawful for the person or persons who shall have paid any duties which shall have previously become due, to apply for and obtain a return of so much of the duty so paid, as will reduce the same to the like duty as would have been payable by such person or persons for such annuity, calculated according to the term for which the same shall have endured; which abatement the said commissioners for management of the stamp duties shall settle and determine according to the tables in the schedule hereunto annexed, and shall cause the amount of such abatement to be paid to the person or persons entitled to the same, out of any monies in their hands arising from the duties imposed by this act.

annexed tables, and the duty paid by instalments, &c.

Sect. 9. That the value of any legacy given by way of annuity for any life or lives, or for years determinable on any life or lives, or for years or other period of time, and charged on and made payable out of any other legacy or legacies, shall be calculated, and the duty shall be charged thereon, in the same manner as hereinbefore directed with respect to other annuities; and the duty on the legacy charged with such annuity, if any duty shall be payable for such legacy, shall be calculated on the value of such legacy, after deducting the value of such annuity; and the duty for such annuity shall be paid by the person or persons entitled to the legacy or legacies charged with such annuity, by four equal payments, in the same manner as the same would be payable according to the provisions hereinbefore contained, if such annuity had been a direct gift to the annuitant, and subject to the like proviso in case such annuity shall determine before four years' payment shall become due; and the payment which shall be made for such duty, shall be retained by the person or persons paying the same, out of the first four years' payments of such annu-

The value of annuities payable out of legacies, and the duty, to be calculated according to the annexed tables, and the duty to be charged on the value of such legacies after deducting such annuities, &c.

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ity, if so many shall become due, or out of so many of such payments as shall become due, by equal portions.

Duty on legacies given to purchase annuities, to be calculated on the sums necessary to purchase them.

Sect. 10. That the duty payable upon any legacy given by direction to purchase with any personal estate of the testator or testatrix, or any part thereof, an annuity of a certain amount for the life or lives of any person or persons, or any other term, shall be calculated upon the sum necessary to purchase such annuity according to the tables before mentioned, and shall be deducted from such sum, and paid as in the case of other pecuniary legacies; and the person or persons paying or satisfying such legacy, and the person or persons for whose benefit the same shall be paid or satisfied, shall be discharged, by payment of such duty so calculated as aforesaid, from all other demands in respect of the duty payable on such legacy; and the annuity to be purchased for the benefit of the person or persons entitled to the benefit of such legacy, shall be reduced in proportion to the amount of the duty payable thereon as aforesaid, such reduction to be calculated in the same manner as the duty so payable is hereinbefore directed to be calculated; and the purchase of such reduced annuity, together with the payment of such duty, shall satisfy and discharge such legacy as fully as if an annuity had been purchased equal in amount to the annuity so directed to be purchased.

Duty on legacies, whose value can only be ascertained by application of the allotted fund, to be charged on the money as applied.

Sect. 11. That if any benefit shall be given by any will or testamentary instrument, in such terms that the amount or value of such benefit can only be ascertained, from time to time, by the actual application for that purpose of the fund allotted for such purpose, or made chargeable therewith; or if the amount or value of any benefit given by any will or testamentary instrument cannot, by reason of the form and manner of the gift, be so ascertained that the duty can be charged thereon under any other of the directions herein contained; then and in every such case, such duty shall be charged upon the several sums of money or effects which shall be applied from time to time for the purposes directed by such will or testamentary instrument, as separate and distinct legacies or bequests, and shall be paid out of the fund applicable for such purposes, or charged with answering the same.

How duty on legacies enjoyed by persons in succession, or having partial interests therein, shall be charged,

Sect. 12. That the duty payable on a legacy or residue, or part of residue, of any personal estate, given to or for the benefit of, or so that the same shall be enjoyed by different persons in succession, who shall be chargeable with the duties hereby imposed at one and the same rate, shall be charged upon and paid out of the legacy or residue, or part of residue, so given, as in the case of a legacy to one person; and where any legacy or residue, or part of residue, shall be given to or for the benefit of, or so that the same shall be enjoyed by different persons in succession, some or one of whom shall be chargeable with no duty, or some of whom shall be chargeable with different rates of duty, so that one rate of duty cannot

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be immediately charged thereon, all persons who, under or in consequence of any such bequest, shall be entitled for life only, or any other temporary interest, shall be chargeable with the duty in respect of such bequest, in the same manner as if the annual produce thereof had been given by way of annuity; and such persons respectively shall be so chargeable with such duty, and the same shall be payable when they shall respectively become entitled to and begin to receive such produce, and shall be paid by equal portions during the aforesaid term of four years, if they shall so long continue to receive such produce; and where any other partial interest shall be given, or shall arise out of such property so to be enjoyed in succession, the duty on such partial interest shall be charged and paid in the same manner as the duty is hereinbefore directed to be charged and paid in like cases of partial interests, charged on any property given, otherwise than to different persons in succession; and all and every person and persons who shall become absolutely entitled to any such legacy or residue, or part of residue, so to be enjoyed in succession, shall, when and as such person or persons respectively shall receive the same, or begin to enjoy the benefit thereof, be chargeable with and pay the duty for the same, or such part thereof as shall be so received, or of which the benefit shall be so enjoyed, in the same manner as if the same had come to such person or persons immediately on the death of the person by whom such property shall have been given to be enjoyed, or in such manner that the same shall be enjoyed in succession.

—And by whom payable.

Sect. 13. That the duty payable on any legacy or residue, or part of residue, so given to, or so to be enjoyed by different persons in succession, upon whom the duty shall be chargeable at one and the same rate, shall be deducted and paid by the person or persons having or taking the burthen of the execution of the will or testamentary instrument under which the title thereto shall arise, upon payment or other satisfaction or discharge of every or any part of such legacy or residue, or part of residue, to any trustee or trustees, or other person or persons to whom the same shall be payable or paid in trust or for the benefit of the persons so entitled thereto in succession; and if the same shall not be so paid or satisfied to any such trustee or trustees, then such duty shall be deducted and paid out of the capital of the property so given, upon receipt, by any of the persons so entitled in succession, of any produce of such capital, or any part thereof, according to the amount of the capital of which such produce shall be so received; and where the duty chargeable upon any such bequest for the benefit of or to be enjoyed by different persons in succession, shall be chargeable at different rates, so that the same cannot be paid at one and the same time, but must be paid in succession as aforesaid, then and in such case all and every the person and persons having or taking the burthen of the execution of the will or testamentary instrument in which such bequest shall be contained, shall be chargeable with such duties in

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succession, in the same manner as such persons would be chargeable with the like duties in case of immediate bequest; unless the property bequeathed shall have been paid or otherwise satisfied to or vested in any trustees or trustee as aforesaid, in which case such trustees or trustee, or his, her, or their representatives, shall be chargeable with the duties for and in respect of such property so vested in him, her, or them respectively, in such and the same manner as if he, she, or they had had or taken the burthen of the execution of the will or testamentary instrument, by which such bequest shall have been made; and in like manner, where any partial interest shall be given, or shall arise out of any such property so to be enjoyed in succession, and such partial interest shall be satisfied or paid by the person or persons so enjoying such property, such person or persons shall be chargeable with the duties for and in respect of such partial interest, and shall retain and pay the same accordingly, in such and the same manner as if he, she, or they had had or taken the burthen of the execution of the will or testamentary instrument, by which such partial interest shall have been created; and in all such cases the person or persons so chargeable with duty, shall be debtors to the King's Majesty, his heirs and successors, in like manner, and shall be subject to the like penalties, as the person or persons having or taking the burthen of the execution of such will or testamentary instrument, are hereby made chargeable and subject to.

Plate, &c. while enjoyed in kind, not liable to duty till in possession of persons having power to dispose thereof.

Sect. 14. Provided always, That no duty shall be paid on any articles of plate, furniture, or other things, not yielding any income, and given to or for the benefit of, or so as that the same be enjoyed by, different persons in succession, whilst the same shall be so enjoyed in kind only by any person or persons not having any power of selling or disposing thereof, so as to convert the same into money or other property yielding an income; but if the same shall be actually sold or disposed of, or shall come to any person or persons having power to sell or dispose thereof, or having an absolute interest therein, then, and in each and every such case, the same duty shall be chargeable and paid thereon as if the same had been originally given absolutely, and with full power to sell or dispose thereof, and shall be chargeable upon and paid by the person or persons for whose benefit the same shall be sold, or who shall have power to sell or dispose thereof, or an absolute interest therein, and shall become the debt of such person or persons; but shall not be a charge on any person or persons by reason of his, her, or their having assented to such bequest, as the person or persons having or taking the burthen of the execution of the will or testamentary instrument by which such bequest shall have been made.

Duty on legacies enjoyed in succession to be charged as such,

Sect. 15. Provided always, That where any legacy, or any residue or part of residue, shall be so given by any will or testamentary instrument, that different persons shall become entitled thereto in succession, the duty

shall be charged thereon as given to be enjoyed in succession, whether the person or persons entitled thereto shall take the same under or by virtue of such will or testamentary instrument, and the dispositions therein contained, or in default of such dispositions, and as entitled by intestacy.

whether taken under wills or by intestacy.

Sect. 16. That where any legacy, or residue or part of residue, shall be given to or for the benefit of any person or persons in joint tenancy, some or one of whom shall be chargeable with any duty hereby imposed, and some or one of whom shall not be so chargeable, the person or persons chargeable with duty shall pay such duty in proportion to the interest of such person or persons respectively in such bequest; and if any person or persons chargeable with duty, and entitled in joint tenancy as aforesaid, shall become entitled by survivorship, or by severance of the joint tenancy, to any larger interest in the property bequeathed, than that in respect of which such duty shall have been paid, then, and in such case all and every such person or persons so becoming entitled by survivorship, or by severance, shall be charged with the same duty as if the property to which such joint tenant or joint tenants shall so become entitled had been originally given to or for the benefit of such person or persons only.

Duty on legacies in joint tenancy to be paid in proportion to the interest of the parties.

Sect. 17. That when any legacy, or any residue or part of residue, shall be given subject to any contingency which may defeat such gift, and whereupon the same may go to some other persons or person, such bequest (unless chargeable as an annuity under the provisions herein contained), shall be charged with duty as an absolute bequest to the person or persons who shall take the same subject to such contingency, and such duty shall be paid out of the capital of such legacy, or residue or part of residue, notwithstanding the same may, upon such contingency, go to some person not chargeable with the same duty, or with any duty; and if such contingency shall afterwards happen, and the property so bequeathed shall thereupon go in such manner that the same, if taken immediately after the death of the testator or testatrix under the same title, would have been chargeable with a higher rate of duty than the duty so paid, the person or persons becoming entitled thereto shall be charged with and shall pay the difference between the duty so paid, and such higher rate of duty.

Duty on legacies subject to contingencies, to be charged as for absolute bequests, &c.

Sect. 18. That where any legacy, or the residue or any part of the residue of any personal estate, shall be subjected to any power of appointment to or for the benefit of any person or persons specially named or described as objects of such power, such property shall be charged with duty as property given to different persons in succession; and in so charging such duty, not only the person and persons who shall take previous or subject to such power of appointment, but also any person and persons who shall take under or in default of any such appointment, when and as they shall so take respectively, shall, in respect of their several interests, whether

How duty on legacies subjected to power of appointment shall be charged;

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previous, or subject to, or under, or in default of such appointment, be charged with the same duty, and in the same manner, as if the same interests had been given to him, her, or them respectively, in and by the will or testamentary disposition containing such power, in the same order and course of succession as shall take place under and by virtue of such power of appointment, or in default of execution thereof, as the case may happen to be; and where any property shall be given for any limited interest, and a general and absolute power of appointment shall also be given to any person or persons to whom the property would not belong in default of such appointment, such property, upon the execution of such power, shall be charged with the same duty, and in the same manner, as if the same property had been immediately given to the person or persons having and executing such power, after allowing any duty before paid in respect thereof; and where any property shall be given with any such general power of appointment, which property in default of appointment will belong to the person or persons to whom such power shall also be given, such property shall be charged with, and shall pay the duty by this act imposed, in the same manner as if such property had been given to such person or persons absolutely in the first instance, without such power of appointment.

and how on personal estates directed to be applied in purchase of real estates.

Sect. 19. That any sum of money or personal estate, directed to be applied in the purchase of real estate, shall be charged with and pay duty as personal estate; unless the same shall be so given as to be enjoyed by different persons in succession, and then each person entitled thereto in succession shall pay duty for the same in the same manner as if the same had not been directed to be applied in the purchase of real estate, unless the same shall have been actually applied in the purchase of real estate before such duty accrued; but no duty shall accrue in respect thereof, after the same shall have been actually applied in the purchase of real estate, for so much thereof as shall have been so applied: Provided, nevertheless, that in case before the same or some part thereof shall be actually so applied, any person or persons shall become entitled to an estate of inheritance in possession in the real estate to be purchased therewith, or with so much thereof as shall not have been applied in the purchase of real estate, the same duty which ought to be paid by such person or persons, if absolutely entitled thereto as personal estate by virtue of any bequest thereof as such, shall be charged on such person or persons, and raised and paid out of the fund remaining to be applied in such purchase.

Estates *pur auter vie*, applicable as personal estates, to be charged as such.

Sect. 20. That estates *pur auter vie*, applicable by law in the same manner as personal estate, shall be charged with the duties hereby imposed as personal estate.

Money left to pay duty not

Sect. 21. Provided always, That if any direction shall be given, by any will or testamentary instrument, for payment of the duty chargeable upon any

legacy or bequest out of some other fund, so that such legacy or bequest may pass to the person or persons to whom or for whose benefit the same shall be given, free of duty, no duty shall be chargeable upon the money to be applied for the payment of such duty, notwithstanding the same may be deemed a legacy to or for the benefit of the person or persons who would otherwise pay such duty.

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chargeable as a legacy.

Sect. 22. That, in cases of specific legacies, and where the residue of any personal estate shall consist of property which shall not be reduced into money, it shall be lawful for the person or persons having or taking the burthen of the administration of such effects, or the person or persons by whom the duty thereon ought to be paid, to set a value thereon, and offer to pay the duty according to such value; or to require the commissioners for management of the stamp duties to appoint a person to set such value, at the expense of the person or persons by whom such duty ought to be paid; and it shall be lawful for the commissioners to accept the duty offered to be paid, upon the value set by the person or persons having or taking the administration of such effects, or by whom the duty for the same shall be payable, without such appraisement, if the said commissioners shall think fit so to do; but, if the said commissioners shall not be satisfied with the value so set, on which the duty shall be so offered, it shall be lawful for the said commissioners, notwithstanding such offer, to appoint a person to appraise such effects, and to set the value thereon; on which value so set the said commissioners shall assess the duty payable in respect thereof, and require the same to be paid; but, if the person or persons by whom such duty shall be payable shall not be satisfied with the valuation made under the authority of the said commissioners, and pay the duty accordingly, it shall be lawful for such person or persons to cause the valuation so made under the authority of the said commissioners to be reviewed by the commissioners of the land tax for the time being of the district or place where such effects shall be, at their next meeting after the said commissioners for management of the stamp duties shall have assessed and required payment of such duty as aforesaid, if fourteen days shall have elapsed between such time and the meeting of the said commissioners of land tax; and if not, then at the next succeeding meeting of the said commissioners, of which appeal six days' notice shall be given to the said commissioners of stamp duties; and the said commissioners of the land tax shall and may, (if they think fit), appoint a person to appraise such effects, and set a value thereon; and shall and may hear and determine such appeal, in the same manner as in any other cases of appeal to them, and with the like authorities; and their judgment shall be final. And if the valuation made under the authority of the said commissioners of the stamp duties, in the case last mentioned, shall not be duly appealed from within the time aforesaid, or shall be affirmed upon appeal, the duty shall be paid according to such valuation;

Mode of ascertaining duty on property not reduced into money.

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and if any variation shall be made on such appeal, the duty shall be paid according to such variation; and if the duty assessed in manner aforesaid shall exceed the duty offered to and refused by the said commissioners of stamp duties, the expense of such appraisement and other proceedings in assessing such duty shall be borne by the person or persons by whom such duty shall be payable. And if any dispute shall arise between any person or persons entitled to any such legacy, or residue, or part of residue, and any person or persons having or taking the burthen of the administration of such effects, with respect to the value thereof, or with respect to the duty to be paid thereon, the duty shall be assessed by the said commissioners of stamp duties, on reference to them by either party for that purpose; and if the value of any property on which such duty ought to be paid shall be in dispute, the said commissioners of the stamp duties shall cause an appraisement to be made thereof, at the expense of the person or persons by whom such duty ought to be paid, in the manner hereinbefore directed in other cases, and assess the duty thereon accordingly. And if such person or persons by whom such duty ought to be paid shall be dissatisfied with such valuation, or with the assessment of duty made upon such valuation by the said commissioners of the stamp duties, the same shall be reviewed and finally determined by the said commissioners of the land-tax, upon appeal to them within the time, and under the restrictions, and in the manner hereinbefore directed in other cases; but if such valuation or assessment shall not be duly appealed from within the time limited for that purpose, or shall be affirmed upon appeal, the duty shall be paid according thereto; and if any variation shall be made therein on such appeal, the duty shall be paid according to such variation; and in case the effects whereon any such duty shall be payable shall be at the distance of ten miles from London, then and in such case, it shall be lawful to make the like application to such person as shall be deputed for that purpose by the said commissioners to act in their stead, in such cases, within the county or district in which such effects shall be; and such person so deputed shall act in such cases, in all respects in the same manner as the said commissioners are hereby authorized to act, subject, nevertheless, to the instructions and control of the said commissioners.

Duty on legacies not satisfied in money, &c. to be paid according to the value of the satisfaction.

Sect. 23. That, where any legacy or part of any legacy, or residue or part of residue, whereon any duty shall be chargeable by this act, shall be satisfied otherwise than by payment of money, or application of specific effects for that purpose, or shall be released for consideration, or compounded for less than the amount or value thereof, then and in such case the duty shall be charged and paid in respect of such legacy or part of legacy, or residue or part of residue, according to the amount or value of the property taken in satisfaction thereof, or as the consideration for release thereof, or composition for the same. Provided always, that,

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if any legacy or bequest shall be made in satisfaction of any other legacy or bequest, or title to any residue, or part of residue, of any personal estate remaining unpaid, the duty shall not be paid on both subjects, although both may be chargeable with duty, but shall be paid on the subject yielding the largest duty.

If legatees refuse to accept legacies, duty deducted, the Court, in case of suit, may order them to pay costs;

Sect. 24. That, if any person or persons having or taking the burthen of the execution of the will or other testamentary instrument, or the administration of the personal estate of any person deceased, or any person or persons hereby made chargeable with duty, shall declare himself, herself, or themselves ready and willing, and shall accordingly offer to pay any pecuniary legacy, or residue, or part of residue, deducting the duty payable thereon, or shall in like manner offer to deliver or otherwise dispose of any specific legacy, or any specific property, part of any residue of any personal estate, to or for the benefit of the person or persons entitled thereto, or to any trustee or trustees for such person or persons, upon payment of the duty payable in respect thereof, and the person or persons entitled to such legacy, or residue, or part of residue, or the trustee or trustees for such person or persons, shall refuse to accept such offer, and to give a proper release and discharge for such legacy or residue, or so much thereof as shall be offered to be paid, delivered, or otherwise disposed of as aforesaid, then and in such case, although no actual tender shall be made, if any suit shall be afterwards instituted for such legacy or effects, respecting which such offer shall have been made, it shall be lawful for the Court in which such suit shall be instituted, to order all costs, charges, and expenses attending the same to be paid by the person or persons who shall have refused to accept such offer, and to give or join in such release or discharge, or to order such costs, charges, and expenses to be deducted and retained out of such legacy or effects, together with the duty payable thereon, as the said Court shall see fit; and in case any suit shall be instituted for payment of any legacy, or residue, or part of residue, of any personal estate, and the person or persons sued for the same shall be desirous of staying proceedings in such suit, on payment of the money due, or delivering, or otherwise disposing of the specific effects demanded, after deducting or receiving the duty payable thereon, it shall be lawful for the Court in which such suit shall be instituted, if it shall see fit, on application in a summary way, to make such order for payment of such legacy, or residue, or part of residue, or for delivering or otherwise disposing of such effects, and for payment of the duty payable thereon, and all such costs, charges, and expenses attending such suit, as shall be just.

and in suits where the party sued may wish to stop proceedings on payment of bequests, deducting duty, the Court may make order therein.

If suit be instituted concerning administration, the Court to provide for

Sect. 25. That, if any suit shall be instituted concerning the administration of the personal estate of any person dying testate or intestate, or any part of such estate in which any direction shall be given touching the payment of any legacies or legacy of such person, or the residue of his or her per-

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payment of the duty.

sonal estate, or any part thereof, the Court wherein such suit shall be instituted shall, in giving directions concerning the same, provide for the due payment of the duties hereby imposed; and in taking any account of any personal estate, or otherwise acting concerning the same, such Court shall take care that no allowance shall be made in respect of any legacy or part of legacy, or of any residue or part of residue, in any manner whatsoever, without due proof of the payment of the duties hereby imposed.

Executors may discharge legacies on payment of the duty accrued.

Sect. 26. Provided always, That any person or persons having or taking the burthen of the execution of any will or other testamentary instrument, or the administration of the personal estate of any person deceased, may from time to time pay, deliver, or otherwise dispose of any legacy, or any part of any legacy, or make distribution of any part of the residue of any personal estate, on payment, from time to time, of such proportions of the duty hereby imposed, as shall accrue in respect of such part of such personal estate as shall be so administered.

No legacy, liable to duty, to be paid without a receipt, containing certain particulars;

Sect. 27. That no person or persons having or taking the burthen of the execution of any will or testamentary instrument, or the administration of the personal estate of any person deceased, nor any trustee or trustees, or other person or persons hereby directed and required to account for any duty, shall, from and after the passing of this act, pay, deliver, or otherwise dispose of, or in any manner satisfy, discharge, or compound for any legacy whatsoever, or any part thereof, or the residue of any personal estate, or any part thereof, in respect whereof any duty is hereby imposed, without taking a receipt or discharge in writing for the same, expressing the date of such receipt or discharge, and the names of the testator, testatrix, or intestate, under whose will or testamentary disposition, or upon whose intestacy, the title to such legacy or part of legacy, or to such residue or part of residue, shall accrue, and of the person or persons to whom such receipt or discharge shall be given, and of the person or persons to whom such legacy or residue, or part of residue, shall have been given, or shall have belonged in consequence of intestacy, and the amount or value of the legacy or part of legacy, or residue or part of residue, for which such receipt or discharge shall be given, and also the amount and rate of the duty payable and allowed thereon; and that no written receipt or discharge for any legacy or part of any legacy, or for the residue of any personal estate, or any part of such residue, in respect whereof any duty is hereby imposed, shall be received in evidence, or be available in any manner whatever, unless the same shall be stamped, as required by this act; and no evidence whatsoever shall be given of any payment, satisfaction, or discharge whatsoever, or of any release or composition of such legacy, or any part thereof, or of such residue, or any part thereof, without producing such receipt or discharge, duly stamped as aforesaid, unless the actual payment of the duty hereby imposed shall first be given

no receipt available unless duly stampt, &c.

in evidence*: Provided always, that a copy of the entry, in the books of the commissioners of the stamps, of the payment of such duty, shall be admitted as evidence thereof: Provided also, that payment of any annuity shall not be deemed a payment for which such stamped receipt shall be required, under the directions of this act, except the several payments which shall complete the payments for each of the first four years during which such annuity shall be payable; and in like manner, any payment in respect of any legacy or bequest, hereby directed to be charged with the duty in the same manner as annuities are hereby made chargeable with duty, shall not be deemed a payment for which such stamped receipt shall be required, except the several payments which shall complete the payments for each of the first four years, in respect of which such legacy or bequest shall be chargeable with duty as an annuity.

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Copy of entry at Stamp Office of payment of duty, evidence.

Stampt receipts for annuities not required but on completing payments for each of the first four years.

Sect. 28, imposes on executors and trustees a penalty of 10*l. per cent.* for paying or receiving legacies without stamped receipts.

Penalty.

Sect. 29, directs receipts to be stamped within twenty-one days after date, on which an acknowledgment of payment of the duty shall be written, &c.; and provides, that receipts may be stamped within three months after date, on payment of duty, and 10*l. per cent.* penalty; but none to be stamped unless the duty be paid, and they are brought to be stamped within the limited time.

Receipts, how to be stamped.

Sect. 30, directs, that mistakes in paying duty may be rectified, if no suit be instituted, on payment of the difference within three months, and 10*l. per cent.*

As to rectifying mistakes.

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* It is submitted that this section does not, as has been sometimes supposed, prevent a release of particular property charged with a legacy from being given in evidence, unless stamped as here required; the statutory provision evidently relates to the acknowledgment of the receipt for the legacy usually taken by the executor for his own discharge: a legatee, of course, may release a legacy without receiving it, and then clearly the duty does not attach; *a fortiori*, may he release any particular fund or property. It will be proper, however, in order to obviate any objection of this nature, that, where a legatee joins in the deed of conveyance to a purchaser, or executes any separate instrument, discharging the land or the purchaser from the legacy, the instrument should not express the legacy to be *paid*, but merely that the legatee has agreed to discharge the property in question from his lien or charge. Still, it may be necessary for a purchaser to see not merely that the land is released, but that the duty has been paid; for if, after the legatee has exonerated the land, he should receive the legacy without the duty being paid, the Crown, it is conceived, would have a lien on the property for the duty.

Releases to purchasers, &c., not within the act.

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36 Geo. 3, c. 52.

Sect. 31, indemnifies persons paying or receiving money contrary to this act, on discovering the other offender.

If by infancy or absence legacies cannot be paid, the money may be paid into the bank, and laid out in the 3*l. per cents.*

Sect. 32. That where, by reason of the infancy, or absence beyond the seas, of any person entitled to any legacy, or to the residue of any personal estate, or any part thereof, chargeable with duty by virtue of this act, the person or persons having or taking the burthen of any will or testamentary instrument, or the administration of such personal estate, cannot pay such legacy or some part thereof, although he, she, or they may have effects for that purpose, or cannot pay such residue, or some part thereof, although he, she, or they may have the same, or some part thereof, in his, her, or their hands, it shall be lawful for such person or persons to pay such legacy or residue, or any parts or part thereof respectively, or any sum or sums of money on account thereof, after deducting the duty chargeable thereon, into the Bank of England, with the privity of the accountant-general of the Court of Chancery, to be placed to the account of the person or persons for whose benefit the same shall be so paid; for payment of which money the said accountant-general shall give his certificate, as usual in such cases, on production of the certificate of the commissioners of stamps, that the duty thereon has been duly paid; and such payment into the Bank shall be a sufficient discharge for the money so paid in, provided the duty be also paid thereon as aforesaid; and such money, when paid in, shall be laid out by the said accountant-general, without any formal request for that purpose, in the purchase of 3*l. per centum* Consolidated Annuities; which, with the dividends thereon, shall be transferred and paid to the person or persons entitled thereto, or otherwise applied for his or their benefit, on application to the Court of Chancery, by petition or motion, in a summary way: Provided always, that, if it shall afterwards appear that such money, or any part thereof, has been improperly paid into the Bank as aforesaid, it shall also be lawful for the said Court of Chancery, upon petition, in a summary way, to dispose thereof, and of the annuities purchased therewith, and the dividends received thereon, in such manner as justice shall require: Provided also, that, if it shall appear that the duty paid in respect of any such sum of money was more than ought to have been paid, it shall be lawful for the person or persons who shall have paid such duty, to apply to the said commissioners for management of the stamp duties, to repay such excess of duty; and the said commissioners are hereby authorized, upon such application, to repay such excess of duty to the person or persons who shall appear to them entitled to receive the same, or to pay such excess of duty into the Bank, with the privity of the said accountant-general, for the benefit of the person or persons entitled, there to be placed to the same account, and to be applied in the same manner as the same would have been applicable if paid together with the remainder of the legacy or sum of money in respect of which the same shall

If such money be improperly paid in, the Chancery may dispose thereof.

If more than the proper duty has been paid, the commissioners for stamps may return the excess;

have been paid; and the said commissioners are hereby authorized to make such payments respectively out of the monies in their hands arising from duties imposed by this act. And if the duty paid to the said commissioners shall appear to be less than the duty which ought to have been paid, it shall be lawful for the person or persons who paid such money into the Bank as aforesaid, upon payment of the full duty to the said commissioners, in such manner as the same ought to be paid, with such penalties, if any, as ought to be paid in respect thereof, to apply to the Court of Chancery, in a summary way, for the repayment of the further sum paid to the said commissioners for such duty, out of the money in the Bank so paid in by such person or persons, or the produce thereof; which payment the said Court is hereby authorized to order.

and if less, on payment of the full duty, the Chancery may order repayment to the party.

Sect. 33. That, if at the end of two years after the death of any person deceased, it shall appear, to the satisfaction of the said commissioners of stamp duties, that it will require time to collect the debts or effects of such person then outstanding, or that, from circumstances, it will be difficult to ascertain or adjust the amount of the clear residue of the personal estate of such person liable to duty, and the parties interested therein shall be desirous of compounding for the duty thereon, it shall be lawful for such parties respectively, with the consent of the commissioners of stamp duties, to make application to the Court of Exchequer at Westminster, if the deceased person resided in England or elsewhere, except in Scotland, and to the Court of Exchequer in Scotland, if the deceased resided in Scotland, for leave to compound such duty, stating upon oath the particulars of the personal estate for which such composition shall be proposed to be made, by affidavit to be filed in the said Court, and declaring at the same time upon oath, whether any other property of the deceased, then outstanding, besides the property for which such composition shall be proposed to be made, hath come to the knowledge of the said parties, or any of them, and the nature thereof, and the circumstances attending the same; and in such case, it shall be lawful for the said Court of Exchequer in England or Scotland, as the case may be, to appoint a proper person to set a value on the personal estate, or such part thereof, for which no duty shall have been charged, and which shall be specified in such affidavit as the property for which such composition shall be desired, and to adjust and settle the duty which, justly and equitably under all circumstances, ought to be paid in respect of such personal estate so specified; and thereupon, it shall be lawful for the said commissioners, and they are hereby required, if the said Court of Exchequer, to which such application shall be made, shall confirm the said adjustment and settlement, and order the duty to be accepted accordingly, and by authority of such order to accept payment of the sum so adjusted and settled, in full discharge of the duty on so much of such personal estate as shall be so specified, and according to such order, and to enter the

If it shall appear to the commissioners for stamps, at the end of two years after the death of any person, that it will require time to collect the effects, or be difficult to ascertain the residue of the personal estate, the duty may be compounded for

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same in their books accordingly, and to grant certificates thereof, expressing the receipt of such duty by way of composition under such order; and every such person to whom such certificate shall be granted, and every future representative of the same estate, and all persons entitled to the benefit of the property for which such composition shall be so paid, shall be discharged from any further payment of duty on the same; and in all future payments of such property, it shall be lawful for the persons having or taking the burthen of the execution of any will or testamentary instrument disposing such property, or the administration thereof, to pay, apply, and dispose of the same, and for all persons entitled to the benefit thereof to receive the same, without having the receipts and discharges in writing, hereby required to be given and taken for the same, stamped as hereinbefore directed; provided such receipts or discharges shall express the same to be given under the authority of such composition as aforesaid, and not liable to duty: Provided always nevertheless, that the duty shall be charged and paid upon all and every part of the personal estate of such person deceased, other than that which shall be specified in such affidavit as aforesaid, and included in the valuation in which such composition shall have been made as aforesaid, and for which the said Court of Exchequer shall allow and order such composition to be taken as aforesaid, in the same manner as if no such composition had been made; and all and every person and persons shall be liable to all the like penalties and forfeitures for not duly paying the duty for such personal estate not compounded for, and subject to the like rules, methods, and directions, for charging such duty, as such person and persons respectively would be liable to, if such composition had not been made.

Duty to be paid on any part of personal estates not included in the composition.

If any legacy be refunded, the duty to be repaid.

Sect. 34. That if at any time after payment of duty on any legacy, or residue, or part of residue, of the personal estate of any person deceased, any debt shall be recovered against the estate of such deceased person, or any loss shall happen, by reason whereof, or for any other just cause, any legatee or other person, by whom any legacy or part of legacy, or any residue of any personal estate, hath been received or retained, shall be obliged to refund the same, or any part thereof, then in every such case it shall be lawful for the said commissioners of stamp duties, and they are hereby required, on due proof made on oath as aforesaid, to their satisfaction, of the amount of such sums refunded, and that by reason thereof there hath been an over-payment of duty, to settle and adjust the amount of such over-payment, and to repay the same out of the money in their hands, arising from the duties by this act imposed, or to allow the same in future payments, as the case may permit or require.

Executors, previous to retaining their legacies, to transmit the particulars, with the duty

Sect. 35. That whenever any person or persons having or taking the burthen of the execution of any will or testamentary instrument, or the administration of any personal estate as aforesaid, shall be entitled to any legacy, or the residue, or any part of the residue, of the personal estate of

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any testator, testatrix, or intestate, such person shall be chargeable with the duty whenever he, she, or they shall be entitled, in the due course of administration, to retain to his, her, or their own use, any part of the said estate, in satisfaction of such legacy, or residue, or any part thereof; and every such person, before any such retainer, shall transmit to the said commissioners of stamp duties, or their officers, a note containing the particulars of such legacy, residue, or part of residue, intended to be retained, and the amount or value thereof, and the duty which such person or persons shall offer to pay thereon; and the said commissioners shall charge and assess the duty thereon, in such manner as the duty shall be chargeable thereon by virtue of the provisions in this act contained, and such duty shall be paid accordingly; and on payment of the said duty, the said receiver-general of the said duty, or officer appointed to receive the same, shall, at the foot of a duplicate of the said assessment duly stamped, in such manner as the said commissioners shall direct for such purpose, give a receipt for such duty in such form of words as the said commissioners shall direct, which receipt shall be a discharge for the duty expressed therein; and in case any such person or persons shall neglect to pay such duty as aforesaid, within fourteen days after the same ought to have been paid as aforesaid, every such person and persons shall forfeit and pay treble the value of the duty which ought to have been paid.

offered, to the commissioners of stamps, who shall charge the same agreeable to this act.

Penalty for neglect of payment of duty for fourteen days.

Sect. 36. 'And whereas doubts have arisen upon the construction of the said acts of the twentieth, twenty-third, and twenty-ninth years of his Majesty's reign, whether the duties thereby imposed were intended to be imposed on all legacies, bequests, and dispositions by will or testamentary instrument whatsoever:' Be it enacted and declared, That all receipts and discharges whatsoever for legacies specific and pecuniary, and of any nature or kind whatsoever, and for all personal estate whatsoever, in any manner given or disposed of by will or testamentary instrument, whether by way of annuity or other particular bequest, or by way of residue, or share of residue, or otherwise howsoever, as well as on personal estate, distributable upon intestacy, except such dispositions as shall be made by any will or testamentary instrument, with respect to which the duties imposed by the said former acts are hereby repealed, shall be deemed and taken to be receipts and discharges for legacies, within the intent and meaning of the said former acts respectively; and all and every person and persons to whom any such legacy, or any part of any such legacy, shall be due and payable at the time of passing this act, or who at the time of passing this act shall be entitled to any residue, or any share or part of any residue, of any personal estate, under any such will or testamentary instrument, or upon intestacy, and also all and every person and persons who shall become entitled to any legacy, or residue, or part of residue, of any such personal estate, after the passing of this

Receipts for legacies except those by wills, respecting which the duties imposed by acts mentioned in the preamble, are repealed, to be deemed receipts within the meaning of those acts;

and such receipts to be given for legacies due at passing this act, and for legacies becoming due afterwards, on which no duty is hereby imposed.

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Stat. 36 Geo. 3, c. 52.

act, upon which no duty is imposed by this act, and upon which the duties imposed by the said former act remain in force and unrepealed, shall, upon receipt or other satisfaction or discharge of any such legacy or part of such legacy, or residue or part of such residue, sign and give a receipt or discharge in writing, duly stamped as required by the said former acts respectively; and the person or persons having or taking the burthen of the execution of any will or other testamentary instrument, or the administration of any personal estate, shall have the like powers to require such receipt or discharge in writing, and to retain the duty payable in respect thereof, and the person and persons paying, or otherwise satisfying or discharging, and the person or persons receiving, or being otherwise satisfied for such legacy, or residue, or part of residue, shall be in like manner debtors for the duty imposed on such receipt or discharge in case of non-payment of such duty, and to the like penalties for enforcing due payment thereof, as by this act are provided with respect to the duties hereby imposed on legacies, and residue of personal estate of persons dying after the passing of this act.

Sect. 37, directs that if administration be made void, and any duty shall have been improperly paid, it shall be repaid; but if it ought to have been paid, it shall be allowed in account with the rightful executor.

Sections 38, 39, and 40, impose penalties for perjury, &c.

Receipts duly stamped, free from all other duties.

Sect. 41. That every receipt or discharge for any legacy or any part of any legacy, or for any residue or part of residue, of any personal estate, which shall be duly stamped as required by this act, shall be free and discharged from all stamp duties imposed by the said recited acts, or by any other act of Parliament upon receipts or discharges for money; and that every such receipt or discharge which shall be duly stamped as required by the said recited acts, and upon which no new duty is imposed by this act, shall be also free and discharged from any stamp duty imposed by any other act upon receipts or discharges for money.

Powers of former acts relating to stamps, to extend to this act.

Sect. 42. That all powers, provisoes, articles, clauses, allowances, and all matters and things prescribed or appointed by any former act or acts of Parliament, relating to the stamp duties on vellum, parchment, and paper, and not hereby altered, shall be of full force and effect with relation to the duties hereby imposed, and shall be applied and put in execution for the raising, levying, collecting, and securing the said duties hereby imposed, according to the true intent and meaning of this act, as fully and effectually, to all intents and purposes, as if the same had severally and respectively been hereby re-enacted, with relation to the said duties hereby imposed."

The remaining sections are not of general utility.

Legacies payable out of real

Under the statute 36 Geo. 3, c. 52, legacies were only liable to duty so far as they were paid out of the personal estate; but the statute 45 Geo

3, c. 28, s. 3, enacted, that every gift by any will or testamentary instrument of any person dying after the passing of the act, which should have effect, or be satisfied, out of the personal estate of any such person, or out of the personal estate which any such person should have power to dispose of, as he or she should think fit; *or which should be charged upon, or made payable out of any real estate,* or out of any monies to arise from the sale of real estate, whether the same should be given by way of annuity* or in any other form, should be deemed a legacy within the meaning of the act; but the act was declared not to extend to any specific sum or sums of money, or any share or proportion thereof charged by any marriage settlement or deed upon real estate, in any case in which such specific sum or share, or proportion thereof, should be appointed or apportioned by any will or testamentary instrument under any power given for that purpose by such marriage settlement or deed.

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estate, made liable to duty by stat. 45 Geo. 3, c. 28.

Section 5 provides, that the duties thereby granted upon legacies charged upon, or made payable out of any real estate, or out of the monies to arise by the sale of real estate, should be accounted for and paid by the trustees to whom the real estate should be devised out of which the legacy should be payable; or if there were no trustees, then by the persons entitled to such real estate; and the said duties should be retained and paid according to the regulations of the statute 36 Geo. 3, c. 52.

By whom such legacies to be paid.

The enactments respecting the legacy duty seem to be framed upon fair and equitable principles, with a few inconsiderable exceptions, indeed, in which, probably rather from inadvertence than design, those principles appear to have been infringed. Thus, the 17th section of the statute 36 Geo. 3, c. 52, while it provides, reasonably enough, that, upon the happening of a contingency, which transfers a legacy from one person to another, the substituted legatee, if chargeable with a *higher* rate of duty than that which has been already paid by the prior or original legatee, shall pay the difference of duty, does not provide, that, in the converse case, (*i. e.* where the substituted legatee would be liable to a *lower* rate of duty), the difference shall be returned. No provision seems to have been made for the case of a legacy being given for life, or any other partial interest, to one person, and becoming eventually divisible among several, so as to be split into fractional shares below 20*l.*, the minimum at which the duty commences. If, in such a case, the ulterior legatees happen to be persons (whether relations of, or strangers to the testator) chargeable with the same rate of duty as the particular legatee, the legacy will, by the 12th section of the act, have

Remarks upon stat. 36 Geo. 3, c. 52.

* Whether a rent-charge created by will is liable to legacy duty is an unsettled point. A suit was lately depending in the Court of Exchequer, in which it would have called for decision, but the case was eventually disposed of on a defect in the pleadings, after an intimation from Lord *Lyndhurst*, that he thought it was liable.

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already borne the duty out of the capital, and as the act does not direct that it shall be refunded, the ulterior legatees become onerated with the duty; though, if from disparity of relationship such legatees should happen to be chargeable with a *different* rate of duty, as the duty will have been paid, not out of the capital in the first instance, but by the legatee for life *pro tanto*, as an *annuitant*, the ulterior legatees will be exempt.

As to charitable bequests.

An attempt has been sometimes made to claim exemption for a charitable bequest, on the ground that the testator's bounty flows in such a channel, that no individual receives a benefit equal to 20*l.*, as where it directs an annual distribution of bread among the poor of a parish; but the obvious answer is, that the legacy, being devoted to a specific purpose, is liable as a whole, without regard to the amount of the shares of the objects to become benefited in the course of its application, which depends upon subsequent accidents, and cannot previously be ascertained. *In re Francklin's Charity*, 3 Sim. 147.

Real estate directed to be converted, chargeable as personalty.

Real estate directed to be sold, which by the general rule of equity is impressed with the character of personal estate, is liable to the legacy duty, and is not exonerated by the fact of the legatee electing to take it as real estate. Thus, where a testator devised to A. and B. his real estate, including a share in the New River Water Works, upon trust, as soon as possible after his decease, to sell the same by public auction, and willed that the profits arising therefrom should be deemed part of the residue of his estate thereinafter disposed of, or go in aid if necessary of the rest of his property in discharge of his pecuniary legacies; the testator then bequeathed various legacies, and devised the residue of his estate and effects to A., his heirs, executors, administrators, and assigns, and appointed A., B., C., and D. executors. The personal estate being sufficient to discharge the debts and legacies, without having recourse to the real property, the New River share was not disposed of by the trustees, but passed *in specie* to A., the residuary devisee and legatee. The legacy duty was claimed by the Crown on this share under the clause in the stat. 48 Geo. 3, cap. 149*, (the act then in force), which imposes the duty on the clear residue of "monies to arise from the sale, mortgage, or other disposition of any real or heritable estate, directed to be sold, mortgaged, or otherwise disposed of" by will, &c. It was contended for the defendant, that since he had elected to take the property as real estate, it was exempt from the duty, which was imposed not on the value, but on the clear residue of the monies to arise from the sale, which necessarily supposed an actual conversion. But the Court held, that it was liable. *Thompson*, C. B., observed—This is not a bequest of the pro-

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* It will be seen, *ante*, p. 371, that the terms of the present act, 55 Geo. 3, c. 184, correspond, in regard to this point, with those of the stat. 48 Geo. 3, c. 149.

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perty in question, directing it to be sold with a view solely to the payment of debts, but it is directed to be sold in all events, and to be turned into money. The profits arising therefrom were, by the will, to go in aid of the rest of his property, if necessary, in discharge of his pecuniary legacies; but it is not directed to be sold for that purpose merely, but generally to be sold, and the money to go as residue of his personal estate. Now, all the residue of the testator's estate goes to Holford, the defendant, a stranger in blood; and this property would be considered in equity as sold, although it might not be in fact sold: and supposing him to have died before election, it would have gone to his personal representatives; and shall it be said, that by not selling it according to the directions of the will, he shall be enabled to intercept the duty? He has, it is true, a right to take it in its original state, as between himself and the executors; but he must not, by so doing, be permitted to evade the duty to which, if sold, it would have been liable; and it must be considered as having been actually sold by the executors, and that the money arising from the sale had been by them paid over to the devisee. *Attorney-General* v. *Holford*, 1 Price, 426.

Interest on capital up to the time of rendering account, liable to duty.

In the case of *Attorney-General* v. Lord *George Cavendish*, Wightw. 82, the Court of Exchequer decided, that legacy duty was payable on the residue of a testator's effects, not merely according to its amount at the time of the death, but on the aggregate of the capital, and the interest accrued upon such capital up to the time of the rendering the account to the stamp office.

Crown entitled to the produce of fund, which ought to have been appropriated to the payment of duty.

In *Thomas* v *Montgomery*, 3 Russ. 502, the same rule was contended to apply to pecuniary legacies; but the case seems not to have raised the point. The facts were, that the Duke of Queensbury, (who died in 1810), by his will bequeathed legacies to an immense amount, (no less than 605,000*l.* and upwards), which he directed to be paid within three months after his decease. Shortly after the testator's death, a suit in Chancery was instituted on behalf of the legatees. The legacies remained unpaid for several years, in consequence of certain claims on the assets, and the complicated state of the accounts. In 1818 and 1824, however, two large sums were, under orders of Court, divided among the legatees rateably; on both which occasions legacy duty was paid on these sums. In 1827 there still remained 347,000*l.* due for principal and interest on the legacies; but only about 11,000*l.* of this sum was for capital, the residue being made up of interest. The Crown claimed the duty on the whole sum remaining unpaid; the legatees insisted, that it only attached on the 11,000*l.*, the amount of capital remaining unpaid. Lord *Lyndhurst*, C., said —"It is the duty of the Court to put all parties as nearly as possible in the same situation as if the legacies had been paid three months after the testator's death. A certain sum has been appropriated to the satisfaction of the legatees and the payment of the duty; for, a sum appropriated for the legacies must be considered as appropriated in part for the payment

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of the duty which attaches upon the legacies. It must be considered as so appropriated from the time when the legacies were payable; at that time, a certain proportion of the appropriated sum would have belonged to the legatees, and a certain proportion of it would have belonged to the Crown; and it appears to me to be the justice of the case, and not contrary to the acts of Parliament, but rather consonant to their whole scope and spirit, that the legatees should have that part of the fund which they would have had if the appropriation had been made at the time fixed by the will, and that the Crown should have the full benefit of that part of the fund, which it would have been incumbent on the Court, at the same time, to have set apart for the discharge of duty."

Remarks upon *Thomas* v. *Montgomery*.

I do not understand the Lord Chancellor, in this case, to have decided, as the learned reporter considers him to have done, that "when a legacy is not paid at the time appointed by the testator, legacy duty is payable, not merely on the capital sum bequeathed, but on the aggregate amount of capital and interest which is ultimately received by the legatee;" for, his Lordship expressly declares, that the Crown and the legatees ought to stand in the same situation as if the legacies had been paid three months after the testator's death; meaning, it is submitted, that the Crown should have the accumulations arising from the fund which ought *then* to have been applied in paying the duty. The distinction between the cases of *Attorney-General* v. *Cavendish* and *Thomas* v. *Montgomery* is, that in *that*, duty was allowed on the interest, and in *this*, interest on the duty; or, to speak more accurately, in the latter case, the Crown took the produce of the fund, which had become by previous constructive appropriation its own.

What is retainer of a legacy by trustees and executors.

What is payment or retainer of a legacy, within the legacy-duty acts, has often been the subject of controversy, the struggle being, to determine whether a fund bequeathed to executors in trust, and held by them as such trustees, when the accounts of their executorship are wound up, is to be considered as having been retained or satisfied at this period. If the matter were *res integra*, one should scarcely have hesitated to pronounce that it was; but a perusal of some recent decisions of the Court of Exchequer will shew the insecurity of acting on any such conclusion.

Attorney-General v. Lady *Louisa Manners*.

Thus, in the case of *Attorney-General* v. Lady *Louisa Manners*, 1 Price, 411, where Lord *William Manners*, by his will, dated 8th of July, 1771, gave and bequeathed the sum of 13,000*l.* to his executor, John Manners, in trust to place the same out at interest in the funds, or on real security, and to pay the interest or proceeds arising therefrom to his reputed son, the Rev. Thomas Manners, for life; and, after his decease, the testator directed that one moiety thereof should be paid to the eldest son, and the other moiety to the younger children of the said Thomas Manners. The testator died shortly after the execution of his will; John Manners, the executor, did not place out the 13,000*l.* on security, but retained it in his own hands, and paid the interest to Thomas Manners, un-

til the year 1794, when he (Thomas Manners) and his children applied to the executors of John Manners, the executor, (who was then dead), to invest the money in the funds; and they accordingly laid out the same in their own names in the Navy 5 *per cents.* Thomas Manners died in December, 1812. The point raised by the case was, whether the legacy of the respective moieties to the eldest child and younger children was liable to the duty of 8*l. per cent.*, imposed by stat. 48 Geo. 3, c. 149, on legacies given to strangers in blood by the will of any person who died before the 5th of April, 1805, *and which should be paid, delivered, retained, satisfied, or discharged, after the* 10*th of October*, 1808. It was contended, for the legatees, that the executors, as soon as they had assets in their hands applicable to the payment of the legacy, had "received" and "retained" it, within the meaning of the act, or, at all events, that it was discharged in 1794, when it was invested in the funds, upon the trusts of the will; so that, if the Bank had failed, the executors, and not the legatees, must have borne the loss; but the Court decided, that the legacy was liable to the duty. *Thompson*, C. B., after stating the case, observed—"In point of fact, it remained matter of uncertainty, till after the death of Thomas Manners, who would be entitled to receive the legacy; for it was not given to the children of Thomas Manners then living, but one moiety was bequeathed to his eldest son, and the other to his younger children. At the time of making the will, and at the death of the testator, there were only two children of Thomas Manners living. This bequest, therefore, would certainly vest in all the children of Thomas Manners who should be living at the time of the testator's death; for it is not a bequest of a moiety to his eldest son then living, but to the eldest son, and of the other moiety to the younger children. Now, although their separate shares vested in all the children of Thomas Manners living at the death of Lord William Manners, they were still liable to open and let in any other children coming in *esse* during the life of the father, the bequest being to the younger children, and not to the younger children then living. The consequence of this construction is, that the capital could not be paid till the death of Thomas Manners, because, as he was tenant for life, it would be uncertain, till his death, who would be entitled to it, as that depended on what children he should leave at that time. In this situation, John Manners, the executor of Lord William Manners, does nothing in the shape of appropriating the legacy which is given to him as executor, to be set apart to answer the purposes of the testator's will. He retains it indeed, as it appears, in his own hands, but it is never divided from the bulk of his personal estate; he keeps it in this way, and pays the interest to Thomas Manners, the person entitled to it under the will, during his (the executor's) life, up to the period of his death. After that time, which was in the year 1773, the present defendants, who are the executors of John Manners, and con-

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sequently are now also executors and personal representatives of Lord William Manners, for the first time do what is something like an appropriation of this legacy; but that was merely laying it out and investing it in the funds, in their own names, it being uncertain who would become absolutely entitled to it, till the death of Thomas Manners. That event has now happened, and on that it appears, that his two children, Thomas and William, were the only persons who ever became entitled to the principal of the legacy; and they could not, till that time, have known what would have been the amount of their shares. They had each disposed of their interest*: William, by his will, in 1791, having devised his moiety to his children, and Thomas having settled his moiety on his wife for life, with remainder to his children, with a direction that it should be laid out in land, to be limited to those uses. Now, as to the question of this being a legacy retained after the 10th of October, 1808, it is, in fact, actually retained at this moment, and retained for the benefit of those legatees who became entitled to it on the death of Thomas Manners; that is, for the benefit of their representatives; and we are of opinion that it comes precisely within the description in the act of the 48 Geo. 3, of 'a legacy which has been retained after the 10th of October, 1808, for the benefit of persons strangers in blood' to the testator; and being given by a will dated so far back, the testator having died in the year 1771, it is subject to the duty demanded by this information."

Case of *Hill* v. *Atkinson.*

A question of this nature came under the consideration of Lord *Eldon* in the case of *Hill* v. *Atkinson*, 2 Mer. 48; *S. C.* 3 Pri. 404; where a testator by his will gave to H. and T. 3000*l.*, upon trust to invest the same on Government securities, and to pay the interest to Ann Atkinson for her life, and after her decease (subject to a contingency which never happened,) to Tabitha Leake; and the testator directed H. and T. to invest the 3000*l.* in the funds as soon as conveniently might be after his decease,

* This fact seems to be quite immaterial; for the only question was, whether the legacy had or had not been retained, and not who was entitled; for clearly, a fund may be set apart for the payment of a legacy, although it be quite uncertain to whom such legacy will eventually belong. One should rather have expected, from the previous line of argument adopted by the Lord Chief Baron, to have found in this place some reasons why the investment in the funds was not a retainer within the meaning of the act, since he had, in the former part of his judgment, laboured to shew, that the mere act of holding the money and paying the interest to the legatee, was not a retainer, *because the fund had not been divided or severed from the bulk of the estate;* and yet, after referring to the fact of the investment, which, plausibly at least, might have been contended to amount to such a severance, he makes no attempt to shew that *this* superadded circumstance did not vary the case.

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and appointed them executors of his will. The testator died in 1776, when the execution of the trusts became the subject of certain suits in Chancery; and by decree pronounced at the Rolls in 1779, it was declared, that she was entitled for life to the interest on the legacy, and that Tabitha Leake was entitled to the principal; and it was ordered that the principal should be paid into the Bank, to be laid out in the name of the accountant-general in the purchase of Bank Annuities, in the causes in question, the interest to be paid to Ann Atkinson for her life, and at her decease to Tabitha Leake (who was then an infant), and who should on attaining twenty-one, or sooner if occasion required, be at liberty to apply for a transfer. Under this decree, the executors paid the 3000*l.* into the Bank in 1779, which was laid out by the accountant-general as directed by the decree. Tabitha Leake married, and the reversionary interest in the legacy was settled on her marriage. Ann Atkinson died in January, 1807. In 1808, the Bank Annuities were transferred to the trustees of the marriage settlement. It was contended, that inasmuch as, in 1779, no legacy duty existed, the first act imposing that duty (20 Geo. 3, cap. 28,) having passed more than a year afterwards, the legacy was free from duty; but the Crown insisted that it came within the statute 48 Geo. 3, cap. 149, as a legacy paid, delivered, retained, satisfied, and discharged *after* the 10th of October, 1805; and the case of the *Attorney-General* v. Lady *Manners* was much relied upon. But, Lord *Eldon* decided, that the duty did not attach. His Lordship said, " the executors, by paying in the money under the decree of this Court, effectually divested themselves of the possession of, and all control over the legacy in question, which was immediately after laid out in the purchase of stock, upon trusts which the accountant-general was called upon to declare. Then comes the statute 20 Geo. 3, (1780), imposing a duty rateably on " receipts for legacies," which duty is augmented by two subsequent acts, still following the same description; under which, as was decided in *Green* v. *Croft*, 2 H. Bl. 30, no duty was payable in cases where a receipt could not be given; and accordingly, *Heath*, J., observed, that it was a great error in the legacy acts, that legacies themselves were not chargeable, but only the receipts for them. And the statute of 36 Geo. 3, (27th of April, 1796), was afterwards passed, expressly to remedy the defect then complained of. At the time of the investment of this legacy, Tabitha Leake (the person entitled in succession,) was under age, and incapable of giving any receipt or discharge. In 1792, she married; her interest in the legacy became the subject of the settlement made on that marriage; and in March, 1808, (Ann Atkinson being then dead), the stock in which it had been invested was transferred under an order of the Court to the trusts of the settlement. The case of the *Attorney-General* v. Lady *Louisa Manners* is an authority, as far as it goes, against the prayer of the present petition; because it would seem that, in this case,

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if the legacy had been clearly appropriated, the Court would have held the duty not payable. Whether there was an appropriation in that case, or not, is not now to be considered. It was the opinion of the Barons that an executor, who is also a trustee, shifting a legacy from his hands as executor into his hands as trustee, does not thereby appropriate the legacy; and upon this opinion they acted. But if, where a legacy has been paid into Court under a decree, and the trusts are declared accordingly, it is to be said there has been no appropriation, that would be to deny what has never before been called in question. Then the question is, whether, regard being had to the operation of the other clauses of that statute, it can be said to have been the intention of the Legislature, in the 44 Geo. 3, (adopting the former), to make those legacies "given by or derived from persons dying previous to the 27th of April, 1796," for which no receipt or discharge could have been given, and which would have been consequently exempt from the payment of duty under the previous statutes, liable to the duties then imposed: and my opinion is, that such is not the true construction. Upon the whole, I do not think that, either under the construction of the statutes, or upon the authority of the case in the Exchequer, this legacy can be considered not to have been so effectually appropriated in 1779, as to be exempt from the operation of any of the acts."

Attorney-General v. *Wood.*

The question again arose in the case of *Attorney-General* v. *Wood*, 2 You. & Jer. 290, where a testator bequeathed to A., B., and C. 14,400*l.* Five *per cent.* Annuities, upon trust as to 8000*l.* of the said annuities, to pay the interest and dividends into the proper hands of Ann Buckland during her life for her separate use, and for the maintenance of her children, and after her decease upon trust to transfer the said 8000*l.* Five *per cent.* Annuities unto and amongst the child and children of Ann Buckland, who should be living at her decease, on their attaining twenty-one; and the testator bequeathed all other his estate, after payment of debts, &c., to A. Buckland; and appointed A., B., and C. executors. The testator died in 1794, and the 8000*l.* Five *per cent.* Annuities were transferred from his name to those of A., B., and C., and were afterwards converted by act of Parliament into 8400*l.* New Four *per cents.* In November, 1794, the executors accounted for and paid over the residuary estate of the testator to Mrs. Buckland. They continued to pay to her the dividends on the 8400*l.* New Four *per cents.*, until her decease, which happened in October, 1826. She left three children surviving, who were now absolutely entitled to the legacy. The question was, whether this legacy was liable to the duty under the statute 55 Geo. 3, c. 184, as a legacy "paid, delivered, retained, satisfied, or discharged after the 31st day of August, 1815." The argument for the affirmative was founded principally on the case of *Attorney-General* v. Lady *Louisa Manners*, and the argument for the exemption chiefly on the case of *Hill* v. *Atkinson;* and the Court was of opinion that the duty attached. The grounds

upon which the learned Barons arrived at this conclusion can only be collected from a statement of the judgments delivered by them *seriatim*. *Alexander*, L. C. B.—" I entertain no doubt whatever upon this question, which is, whether, under the particular circumstances stated in this case, corrected as it has been by inserting a few words suggested in the course of the argument, we can say that this legacy has been delivered, retained, satisfied, or discharged, within the meaning of that clause in the act of Parliament, or in the schedule of that act of Parliament referred to, so as to save it from the additional duty imposed in case it should not be delivered, retained, satisfied, or discharged before a certain period. Now, I think, that these facts do not shew that it has been delivered, retained, satisfied, or discharged. I think that nothing has been done that can bear that construction. It has not been delivered to any body, the legacy is not satisfied, nor is it at this moment discharged. In truth, those things could not be, because there was nobody to whom it could be delivered; nobody by whom it could be retained; nobody who could receive satisfaction, or give a discharge for it. It could not be done; and not being capable of being done, it is hardly necessary to say, that it has not been done. The whole argument turns upon this, that what is called an appropriation is, according to the meaning of this act, a delivery, retainer, satisfaction, or discharge. In my opinion, that is very inaccurately argued. There is a case decided in this Court, apparently upon great consideration, by Lord Chief Baron *Thompson*, in which, under circumstances similar to the present, it was held not to be a species of appropriation that could fall within any of the descriptions in this schedule in the act. Against that has been cited a case at a subsequent period, determined by Lord *Eldon*, for whose decisions I have certainly the utmost respect, knowing, as I do, how very much they were considered, and upon what a sound knowledge of the law all those decisions are founded. It is not the case itself that can be justly cited against that former decision, for that comes under circumstances so strikingly different, that it affords a marked distinction, and shews it did not come within the spirit of this act of Parliament, but the language found in the report of the case by Mr. *Price*, in which Lord *Eldon* says, that appropriation means payment. Now, if I were disposed to give the utmost effect to these words, to the utmost extent that the counsel for the defendant could desire, I should not think myself at liberty to consider that which is but an *obiter dictum*, and not necessary to the decision of that case, an authority sufficient to overrule that which was actually done by this Court upon great consideration. But I do not think, even giving full effect to those words, that such a consequence should follow. All that the Lord Chancellor says, is, that a transfer by an executor to himself as trustee, is an appropriation of the legacy. It has been so held for a considerable length of time. For particular purposes unquestionably it is an appropriation. If an executor transfer into his own name as trustee, the

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amount of a particular legacy, and acts upon that transfer, that is an appropriation as against many persons, and in particular as against himself. But the question here is, whether that act so done is to be considered as a delivery of the legacy as against the revenue and this act of Parliament: whether it is a retainer, or a satisfaction, or a discharge. Now the fact is, that it has not been delivered, it has not been retained, it has not been satisfied, and it has not been discharged; but the executor and trustee is at this moment liable in consequence of having this fund in his hands. Can any body of good sense contend, that it has been delivered, retained, satisfied, or discharged, when the same money is now in his hands, and he is liable for it to the persons beneficially entitled to this legacy. The case of *Hill* v. *Atkinson* is a case in which the executor or trustee, or whatever name you give him, was actually discharged, as much as if there had been persons in being entitled to give him a legacy receipt, if a receipt were necessary at that time. The money was paid into Court, and distinguished from all the rest of the testator's effects, but above all taken out of the hands of the executor, and paid into the name of the accountant-general of the Court, under the directions of the Court, for the benefit of the legatees. That, therefore, was an actual payment by the executor, for the use of those persons, whoever they might be. Whether it was a vested interest, or a contingent interest, the executor was discharged, which in this case he undoubtedly is not. I think that case has no application to the present, and I am very clearly of opinion that this party is liable to the legacy duty." *Hullock*, B.—"I am of the same opinion. The only question is, whether the legacy can be said to have been paid or discharged before the death of Mrs. Buckland. Now, the simple state of the facts is, that the testator leaves a sum of 8000*l.* to trustees and executors, in trust that the dividends and proceeds of the money should be paid to Ann Buckland for her life. There could be no pretence for saying that during her life any thing could be done with the money. What is to become of it after her death? Upon her decease it is to be paid to her children, if she have any, when they come of age. They had no right to the money till they became of the age of twenty-one-years, and, after an interval of twenty years, during which the executors and trustees have transferred the fund into their own names, they must be deemed to hold it *secundum subjectam materiem*. They paid her during her life the proceeds of the money; and, upon her death, what takes place? It appears, that her children, who had an immediate right to receive the legacy, had not attained the age of twenty-one. What does the surviving executor do? He sells the stock, and the proceeds are now in his hands. For what purpose? To pay it over to those who are in law entitled to receive it. But was there any person named, provided the children were not entitled to receive it? No one whatever. Then in what way are those words that are found in the 55th Geo. 3, to be construed? As to the hardship of the case, we have nothing to do with

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it; the question is, whether this duty was liable to be paid at any period prior to the time when it could be paid according to the bequests of the will. The words are:—'For every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards, given by any will or testamentary instrument of any person who died before or on the 5th day of April, 1805, out of his or her personal or moveable estate, and which shall be paid, delivered, retained, satisfied, or discharged.' When was it paid? It could not be paid until now; it ought to be paid now; the gentleman has it in his hands, and ought to pay it over. When was it delivered? Delivered, means the delivery of the stock, or something capable of being delivered; it could not be delivered till now, and now it must be paid in money. Retained, means, where an individual has it in his hands as executor, or, according to the language of this case, he retains it for the parties, the legatees, for the benefit of those entitled to receive. Satisfied and discharged, means, when it is paid; those words are synonymous to those which precede them, but not one of those words could, in my judgment, be applied to the state of facts that existed anterior to the death of Mrs. Buckland. If that be so, I should say, according to the true construction of this act of Parliament, that no legacy duty could attach till that time; and I think the way in which it was put, shews that such ought to be the sound construction of that clause. If it is a legacy to a son or daughter, it is subjected to a lesser duty than that which attaches upon foreigners [*qu.* strangers in blood?], and there might have been a difference in the rate. It appears to me, upon the fair construction of the statute, that that is the conclusion at which the Court ought to arrive. But when there is a case, that in my judgment is precisely in point, and certainly not necessarily touched or affected by the other case cited, it does appear to me, that we ought not lightly to depart from a decision already pronounced, and one in which I entirely concur." *Vaughan*, B.—"It does not appear to me, that these claims could be satisfied till the event of Mrs. Buckland's death. I think, upon the plain letter of the act, and upon the authority of the case that has been alluded to, that the construction which my learned brothers have put upon the enactment is correct."

Remarks upon *Attorney-General* v. *Wood*.

It will be observed, that in the case just stated, the executors and trustees had not executed an express declaration of trust, but they had done that which it is conceived was equivalent; they had retained the money in their hands when they made up their accounts as executors, and paid over the balance to the residuary legatee. From that moment they ceased to hold the fund in question in the character of executors, and possessed it as legatees in trust. If the fund, instead of being given to the executors, had been bequeathed to other legatees in trust, would not the payment by the executors to such trustees have been a satisfaction for this purpose? and can the fact of the executors and trustees being the same persons vary the principle? The doctrine, that money remain-

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ing in the hands of an executor may, without any manual transfer, change its character, is strikingly illustrated by the recent decision, that an action at law will lie against an executor for a share of a residue retained by him after rendering his accounts to, and accepting a release from the residuary legatees; *Gregory* v. *Harman*, 1 Moore & Payne, 209; (though it is well known that an action cannot be maintained against an executor for the recovery of a pecuniary legacy; *Dicks* v. *Strutt*, 5 Durn. & East, 690; unless he has made a special promise to pay out of the assets; *Hawkes* v. *Saunders*, Cowp. 289); the circumstance of the retention after the winding up of accounts as executor being considered to turn it into a loan. Indeed, the word "retained," necessarily supposes the possibility of a continuing possession under a changed character; nor, it is probable, would the Court of Exchequer deny this, but would insist, that, in the present instance, the expression was intended only to apply to the case of an executor "retaining" a legacy for his own benefit. But this narrow construction of the word seems to be inconsistent with the sixth section of the statute of 36 Geo. 3, c. 52, *ante*, p. 374, which expressly directs executors to pay the legacy duty "upon retainer for their own benefit, *or for the benefit of any other person or persons;*" which clause affords a strong, and it is conceived a conclusive argument for giving to the word a corresponding construction in the subsequent statutes now under consideration. For when in those statutes reference is made to a retainer, the Legislature must, by necessary and irresistible inference, be presumed to mean such a retainer as it had, in the previous act, designated as the period or occasion for paying the duty. Besides, supposing that in the case of a retainer made since the statute of 36 Geo. 3, the duty payable under that act (being lower than the present rate,) to have been actually paid (as it ought) on the occasion of the executor's re-retaining the legacy, could it be held that the difference ought now to be paid at the distribution? How the learned Barons would have combated the argument founded on the terms of the statute of 36 Geo. 3, c. 52, does not appear, as it was not brought to their attention, and not the slightest allusion is made to it in their judgment. Though the case of *Hill* v. *Atkinson* was certainly distinguishable in its circumstances from those of *Attorney-General* v. *Wood*, yet, the principles laid down by the learned Barons in the latter case, and those recognised by Lord *Eldon* in the former, are not so easily reconcileable. His Lordship evidently thought, that, consistently with the case of *Attorney-General* v. *Manners*, a legacy may be satisfied for the purposes of the act, although it may not have reached the hands of the person eventually entitled to the beneficial interest, and that it was quite immaterial whether the legacy was paid over by the executor to a third person, as a legatee in trust, or retained by himself in that character. The Barons, on the other hand, were of opinion that nothing less than an actual payment and satisfaction of the legacy to the person beneficially entitled, or at least the actually

parting with the fund by the executors, would prevent the duty from attaching; and though some of them laid much stress upon the fact of the objects of the bequest not being ascertainable during the life of the prior legatee for life, yet it is difficult to see how, consistently with the general grounds of their judgment, the adjudication could have been otherwise, if the ulterior legacy had bestowed a vested interest on an ascertained object. Whether the decision will be acquiesced in, or the experiment made of again agitating the question before the distinguished Judge now at the head of the Court of Exchequer, remains to be seen; at all events, the case of *Attorney-General* v. *Wood* must at present govern the conduct of executors, to whom it prescribes the task of deducting the duty imposed by stat. 55 Geo. 3, c. 184, *on every legacy that remains in their hands, not actually parted with prior to the 31st of August*, 1815, *notwithstanding that they are express legatees in trust of such legacy, and have, by any the most formal act, even before any legacy duty was in existence, severed or divided it from the general personal estate, with a view to its appropriation to the specified purposes of the trust.* The doctrine, however, it should be remembered, only applies to persons who are executors as well as trustees, and not to those who are trustees merely; and therefore, if a trustee has, prior to August, 1815, received from an executor a legacy not then liable to duty, to be invested upon trusts, he may now pay or transfer it to the persons who, under those trusts, may have become entitled to it, without deducting the duty.

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If an executor pays a legacy in full, without retaining the duty, both he and the legatee are debtors to the Crown for the amount of the duty, (see stat. 36 Geo. 3, c. 52, s. 6, *ante*, p. 374), which, if paid by the executor, may be recovered by him from the legatee, in an action of *assumpsit*. Thus, where a testatrix devised all her real estates to trustees, upon trust, and bequeathed to the defendant, N. Freeman, an annuity of 100*l.*, clear of all deductions*, during her life, secured upon the testatrix's real estates; the testatrix died in June, 1808; during eight years the trustees paid the annuity to the legatee, and the persons to whom she had sold and assigned it, without deducting or demanding the duty; in 1816 they paid the duty at the Stamp Office, and now brought an action against the annuitant to recover the sum so paid;—and it was held, that the plaintiffs were entitled to recover the amount as money paid on the defendant's account; and that the fact of her having assigned the annuity did not affect their claim against her. *Hales* v. *Freeman*, 4 J. B. Moore, 21; *S. C.* 1 Brod. & Bing. 391.

Executor and legatee both liable for duty to the Crown, and executor paying it may recover from the legatee.

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* Did not these words shew that the legatee was to have the annuity, exempt from the duty? (*Vide post*, p. 404). The case bears upon the point suggested *ante*, p. 391, and would seem to shew the liability of an annual sum issuing out of real estate to the legacy duty.

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What words exempt a legatee from legacy duty.

The legacy duty is payable out of the subject of the bequest, unless the will contains words of exemption shewing that the general personal estate is to bear the charge. What expressions have this effect is often a litigated point.

Where a testator, after giving pecuniary legacies, directed his executors to make payment of all the legacies, "*without any deduction*," as given and bequeathed by that his will, at the expiration of six months from his decease, or sooner if convenient—Lord *Eldon* was of opinion, after much hesitation, that the words "without deduction" referred to the duty, which, therefore, was to be paid out of the general estate. *Barksdale* v. *Gilliat*, 1 Swanst. 562. So, where a testator gave all his real and personal estate to his executors, in trust, among other things, out of the dividends and interest of the trust monies, to pay to his daughter, J. D., for her separate use, for her life, an annuity of 46*l.*, *clear of all deductions whatsoever*, by half-yearly payments: Sir *L. Shadwell*, V.C., ruled that the legacy tax could not be deducted; though it was contended, for the contrary construction, that the words excluding deduction referred to the payment of the land tax, being applicable to the annuity only as a charge on the real estate. *Dawkins* v. *Tatham*, 2 Sim. 492. So, in another case, a direction that annuities should be paid to the legatees, "without any deduction or abatement out of the same, on any account or pretence whatsoever," was construed as a direction to pay the annuities in full, without deducting the duty, on the ground that there were no other deductions to which the annuitants were liable, that the testator could have had in his contemplation. *Smith* v. *Anderson*, 4 Russ. 352.

Whether legacy given by codicil was included in an exemption in the will.

If a testator gives a legacy free from duty, and by a codicil revokes it, giving another sum *upon the same trusts*, the latter is also exempt. *Cooper* v. *Day*, 3 Mer. 154. But where the legacies bequeathed by a will were to be paid free from legacy duty, and the testator by a codicil bequeathed to the husband of one of the legatees, who had died, an equal legacy "instead of" the legacy given by the will to the deceased wife, it was held by Lord *Eldon*, affirming a decree of Sir *J. Leach*, V. C., that the legacy given by the codicil was an independent, distinct, substantive bequest, and therefore was not within the exemption. *Chatteris* v. *Young*, 2 Russ. 183. See also *S. C.* 6 Madd. 30, where the bequests are inaccurately stated.

Testator dying abroad.

It should be observed, that the legacy duty attaches where legacies are paid in England under an English probate, though the testator died abroad. Thus, where the executor of a testator who died in India proved the will in England *de bonis non*, and paid legacies to persons residing in England, it was held, that the legacies were liable to the duty, though the testator resided and the property was possessed by him in India at the time of his death. *Attorney-General* v. *Cockerel*, 1 Price, 165. See also *Logan* v. *Fairlie*, 2 Sim. & Stu. 284; *Attorney-General* v. *Beatson*, 7 Price, 560; *Hay* v. *Fairlie*, 1 Russ. 117.

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Foreign stock, the property of a British subject domiciled in England, and distributable by an English executor (though exempt from probate duty, *Attorney-General* v. *Dimond*, 1 Cromp. & Jerv. 356), has been held to be liable to the legacy duty as English personal property. *In re Ewin*, 1 Cromp. & Jerv. 151; *S. C.* 1 Tyrwh. 91.

Foreign stock.

II. Releases.

A release, in the limited sense in which the word is employed in the present title, (which does not embrace the instrument, considered as a deed of *conveyance*), is the giving up or discharging of a right of action which one hath or may claim against another, or the estate of another. 5 Bac. Ab. Gwill. ed. 680.

Definition of a release.

1. *Releases by Operation of Law.*

Releases by operation of law.

An instance of this kind of release occurs, where a creditor appoints his debtor the executor or one of the executors of his will, which, on the acceptance of probate, absolutely extinguishes the debt *at law*, since the debtor would be a necessary party, as plaintiff, in an action against himself; *Dorchester* v. *Webb*, Sir W. Jones, 345; *S. C.* Cro. Car. 372*; *Wankford* v. *Wankford*, 1 Salk. 299; *Cheetham* v. *Ward*, 1 Bos. & Pull. 630; and the debt being extinguished by this union of the characters of creditor and debtor in the same person, the right of action is not revived by the transfer of the security to a third person, although such security is a negotiable instrument, so that the action would have been brought in the name of the indorsee. If, therefore, the holder of a promissory note appoint the maker one of his executors, the indorsement of the note by the co-executors will not enable the indorsee to sustain an action on the note against the maker. *Freakley* v. *Fox*, 9 Barn. & Cress. 130; 4 Man. & Ryl. 18. What has been stated, however, applies only to the *legal* remedy; for, *in equity*, the executor of course is accountable for the money owing from himself, as part of the assets. *Askwith* v. *Chamberlain*, 1 Rep. Ch. 138; *Field* v. *Clerk*, Ib. 242; *Casey* v. *Goodinge*, 3 B. C. C. 110; *Errington* v. *Evans*, Dick. 456; *Berry* v. *Fisher*, 11 Ves. 87.

Creditor making debtor his executor.

In order to avoid the legal discharge, the debtor is sometimes nominated executor *when the debt shall have been paid;* (for our law admits of a qualified executorship of this kind, *vide* Godolph. 77; Hobart, 265; 3 Bac. Ab. 29; *Carte* v. *Carte*, 3 Atk. 180); and in the meantime administration is granted to another; or if there be a co-executor, he *pro tempore*, (*i. e.* during the disability of the other), solely fills the

As to limited executorships.

* In this case it was held, that, where A. and B. were jointly and severally bound to C., and A. died, appointing D. his executrix, and then C. died, having also appointed D. his executrix, D., as executrix of C., might maintain an action against B.

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office; but the purpose may in general be more conveniently attained by constituting the debtor executor of the general property, *exclusively of the debt*, and then making some other person special executor in respect of this debt; for it is clear that the Ecclesiastical Court will grant probate to one person of one part of the estate, and to another of other part. *Austre* v. *Audley*, 1 Roll. Ab. 914, (S.), pl. 4; Wentworth's Office of Executor, 12; Godolph. 78; 3 Bac. Ab. 30. But in such a case there is only one probate, for all the individuals among whom the office is parcelled out, make in law but one executor. Wentworth's Office of Executor, 13. But if there is a co-executor, of course the expedient of constituting a special and limited executor is not required, as, whatever portion of the goods one executor is excluded from, vests wholly in the other, who is sole executor *pro tanto*.

Debtor making creditor his executor.

In cases the converse of the above, *i. e.* where a debtor appoints his creditor the executor of his will, a similar effect, of course, is produced; for here also, as the creditor becomes debtor to himself, the right of action is necessarily gone; but it is always in the power of the nominee to prevent this consequence, by renouncing the executorship; *Dorchester* v. *Webb*, Cro. Car. 372; Sir W. Jones, 345; or, which is now held to be sufficient, by declining to prove the will and act. *Rawlinson* v. *Shaw*, 3 Durn. & East, 557. See also 1 Selw. N. P. 562.

Marriage of debtor and creditor.

Another instance of a release by operation of law is, where a woman marries her creditor or debtor, which absolutely extinguishes the debt; Co. Litt. 264. b.; but a bond given to a woman, in contemplation of her marrying the obligor, conditioned to pay a sum of money to her or her representatives, after the obligor's death, has been held not to fall under this rule; for, as the bond is not payable until after the determination of the coverture, such coverture works no extinguishment of the debt. *Milbourn* v. *Ewart*, 5 D. & E. 381.

Releases by deed.

2. *As to Releases by Deed.*

What words make a release.

1. *What amounts to a Release.*]—The proper words of a release, according to *Littleton*, are *remise*, *release*, and *quiet*, (now abbreviated into *quit claim*), to which Sir *Edward Coke* has added *renounce* and *acquit*. Co. Litt. 264. b. Any expressions, however, which denote the intention of the one party to discharge the other, are sufficient; and therefore, where by an instrument under seal, "concluded and agreed" between A. and B., A. did acknowledge himself fully satisfied and discharged of all bonds, debts, or demands whatsoever, from the beginning of the world to the present day, by the said B., it was resolved that this acknowledgment by deed of being satisfied, was, in judgment of law, a good release. *Hickmott's* case, 9 Rep. 52 b. So, it has been held that a pardon by act of Parliament of all debts and judgments amounts to a release of the debt, the word pardon including a release. *Lock* v. *Etherington*, 1 Sid. 265. If a man releases to another all actions, without saying "which he hath against him," the latter words,

of course, would be supplied, being necessary to the sense. Shepp. Touch. 344.

Covenant not to sue, when a release.

A covenant never to sue amounts, in construction of law, to an absolute release of the covenantee; for the law, which abhors a multiplicity of suits, by this rule attains a result which without it could only be reached by the circuity of two actions. But a covenant not to sue *for a definite period* is no release; *Lacy* v. *Kinaston*, 1 Lord Raym. 690; *S. C.* 2 Salk. 575; *Carvell* v. *Edwards*, Carth. 211; (see also *Ayloffe* v. *Scrimshawe*, 2 Salk. 573); and therefore cannot be pleaded in bar to an action, even within the prescribed period, unless the deed contain an express provision to this effect. *Dowse* v. *Jeffreys*, 1 Roll. Ab. 939, (L.), pl. 1; Ib. pl. 2; *vide ante*, Vol. 5, p. 200.

Whether right of action suspended by provision in assignment in trust for sale.

In the late case of *Lancaster* v. *Harrison*, 4 Moo. & P. 561, the question was raised, whether the plaintiff's right to recover the amount of certain bills which he had discounted for A., for whose accommodation the defendant had become party to the bills as drawer, was suspended by a deed of assignment, by which A., with the concurrence of both the plaintiff and defendant, had assigned a leasehold dwelling-house and other effects to a trustee, in trust for sale, and to apply the proceeds in paying the bills in question; and which provided, that the premises should be sold or offered for sale, and the produce thereof, if sold, applied for the purposes specified in the deed, before any proceedings should be commenced against A., to compel payment of the bills; *and that no proceedings should be had on them, unless no person should be willing to purchase, or the produce should be insufficient.* A. became bankrupt; his assignees sold the lease for 10*l.*, which they paid to the plaintiffs, who brought the present action against the drawer for the amount of the bills, less the 10*l.* It was contended, for the defendant, that, by the terms of the deed, the plaintiff was precluded from bringing an action until the trustee for sale had sold or attempted to sell the property, which had not been done. But the Court held, that the plaintiff was entitled to recover. "If we take this proviso according to the letter," said Lord C. J. *Tindal*, "it has in fact been complied with. It seems, the premises have been put up to sale. But it is argued that a sale by the assignees of A. was not the kind of sale contemplated by the proviso, and that it should have been a sale by the trustee named in the deed, for the purposes mentioned in the deed. It seems to me, however, that this affords only a ground of complaint against the trustee; it is a mere non-execution of the trust by him; but it clearly is no answer, in point of law, to an action brought upon the bills. Upon the whole, it seems to me, that, if there be any remedy for the defendant under this deed, it must be by application to the Court of Chancery, either against the trustee, or to injoin the plaintiffs from suing on the bills." Mr. J. *Bosanquet* expressed himself in terms which would seem to imply an opinion that a covenant not to sue for a definite period, *proprio vigore* suspended the right of ac-

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tion; but it is probable that the learned Judge did not mean to deny the necessity of an express provision to produce this effect, as such a denial would place him in opposition to the early authorities establishing the long recognised distinction above noticed.

Contemporaneous instrument operates as a defeazance, where.

An engagement not to sue for a definite period, if executed contemporaneously with, and indorsed upon the instrument creating the obligation, will, it seems, be considered as a component part of such instrument, which will receive a qualified construction accordingly. Thus, in the case of *Burgh* v. *Preston*, 8 Durn. & East, 483, where it appearing that, previously to the execution of a common money bond, the following memorandum had been indorsed on it:—" The before-named A. (obligee), hath given an undertaking not to bring any action or suit upon the before-written bond, or assign the same, until after the death of the said B. (obligor);" it was held, that this memorandum was to be considered as qualifying the condition. Lord *Kenyon*, C. J., observed, that this was not like the case of a collateral agreement in a different deed not to sue, in which the Courts have said that the party must resort to his agreement, and cannot plead it as a release, for here the memorandum was annexed to and subscribed before the execution of the bond. The decision of the Court in this case was principally founded upon the case of *Broke* v. *Smith*, Moor, 679, pl. 930, where, in an action of debt upon a bond, the condition of which was to save harmless certain land from all incumbrances created by the obligor, it was held, that an indorsed memorandum, declaring that the condition should not extend to a certain statute acknowledged by the obligor, was to be taken as part of the condition. See also *Ex parte Henecy*, cit. 1 Sch. & Lef. 46.

Effect of a covenant not to require interest on a bond during the life of the obligor.

In the late case of *Morley* v. *Frear*, 4 Moore & Payne, 305, the question, as to the effect of a qualified covenant by the obligee of a bond not to sue, was much considered. The defendant gave to the plaintiff the bond in question, which was conditioned for the payment of 1000*l.*, and the plaintiff executed a deed poll, of even date, whereby, after reciting that the plaintiff would become entitled by virtue of the deed of settlement, executed on a former marriage of his then wife, on the decease of the defendant (her father), to 750*l.*, which the defendant had covenanted to pay at his decease, and that the defendant had given a bond to the plaintiff for 1000*l.* (the bond declared on), and that it had been agreed that the plaintiff and his wife should release all their interest in the said sum of 750*l.*, and that the plaintiff should not receive interest on the said sum of 1000*l.* during the defendant's life, notwithstanding the bond, *and that if the bond should happen to be assigned by the plaintiff, and the defendant should have to pay the interest thereof*, the plaintiff would make good the same; the plaintiff and his wife absolutely released unto the defendant the said sum of 750*l.*; and the plaintiff covenanted that he would not require payment of the 1000*l.* secured by the bond, nor claim interest for the same dur-

ing the life of the defendant; and that, in case the bond should be assigned by the plaintiff, and the defendant should be required by the assignee to pay the principal, the plaintiff would pay the defendant interest for the same during the defendant's life. The plaintiff assigned the bond, and the present action was brought by the assignee. It was contended that the deed poll operated as a defeazance of the bond, but the Court decided that the present action was well brought. Lord C. J. *Tindal* observed—"There is a marked distinction between two parts of the deed poll, which it is impossible to overlook. The one, consisting of a release of a deed, by which the defendant covenanted to pay 750*l.* after his death; and the other, a covenant by the plaintiff not to sue or require payment of the 1000*l.*, secured by the substituted bond, during the life of the defendant. There are, undoubtedly, many cases in which a covenant not to sue may, if such be the intention of the parties, operate as a release, as in *Lacy* v. *Kynaston*, where Lord Chief Justice *Holt*, in delivering the judgment of the Court, said, (1 Ld. Raym. 690, *S. C.* 2 Salk. 575), 'It was objected, that a perpetual covenant never to take advantage of a covenant, &c. is a release. The Court agreed to it for avoiding circuity of action:—as, if A. be bound to B. in a bond, &c., B. covenants never to sue A. upon this bond; this will be a bar in debt brought upon the bond; because B. has bound himself against all the remedy that he might have upon the bond. But if A. and B. be jointly and severally bound to C., and C. covenants never to sue A., this is no defeazance, because he has a remedy against B., but A. will have only covenant, &c.' Now, it is necessary, in this case, to look at the relative situations of the parties at the time the deed poll was executed, in order to ascertain whether it was their intention that it should operate as a defeazance or as a release. It certainly operates as a release of the plaintiff's claim on the defendant for 750*l.*, being the portion the plaintiff was entitled to receive in right of his wife, after the defendant's death; but the bond for 1000*l.* was given in lieu of that sum; and, by the deed poll, the plaintiff merely covenants that he should not require payment of that sum, nor claim any interest for the same during the life of the defendant; and that, in case the plaintiff should assign the bond to any person, and the defendant should be required by the assignee to pay the principal, then, that the plaintiff would pay the defendant interest for the same during the term of his life. The plaintiff, therefore, only covenanted that he himself would not require or demand payment of the principal or interest during the life of the defendant; but the introduction of that exception or proviso, that in case the plaintiff should assign the bond, and the defendant should be required by the assignee to pay the principal, shews that the parties contemplated that the plaintiff might raise money on the bond, and assign it to another, who might sue the defendant for the principal; and in case of his recovering, the plaintiff

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was to pay the interest on the sum recovered during the life of the defendant. The parties meant that the plaintiff should stand in the same situation as he did before the bond was executed; and if it had not been given, the plaintiff might have assigned his interest in the sum of 750*l.*, which he would be entitled to receive on the death of the defendant. If, indeed, the defendant had reason to suppose that the assignment of the bond was fraudulent, or that the action was brought to enable the plaintiff to recover for himself, he might have pleaded the fraud."

Release must be under seal.

A release must be under seal. In *Rogers* v. *Payne*, 1 Wils. 376, in an action of covenant for non-payment of a sum of money, the defendant having pleaded a discharge in the nature of a release without deed, the plea was held on demurrer to be ill, on the ground that a covenant to pay money, which is by deed, could not be discharged without deed. See also *Neal* v. *Sheffield*, Cro. Jac. 254; *Blake's case*, 6 Rep. 44; *Mease* v. *Mease*, Cowp. 47*; *Reeves* v. *Brymer*, 6 Ves. 516†; *Thomas* v. *Courtnay*, 1 Barn. & Ald. 1. And though an executory parol agreement may be discharged by parol, yet a cause of action, which has actually accrued even under such an agreement, cannot be so released, but requires a deed; *Langdon* v. *Stokes*, Cro. Car. 383; see also *Hurford* v. *Pile*, Cro. Jac. 483; *Treswaller* v. *Keyne*, Ib. 620; unless it admit of the plea of accord and satisfaction. In pleading a release in equity, it is sufficient to state that it was "sealed and delivered," without also expressing it to have been *signed*. *Taunton* v. *Pepler*, 6 Madd. 166.

Who may make releases.

As to releases by husband partners, executors, and administrators.

2. *Who competent to make, and who may take Advantage of Releases.*] A man of course may release a sum of money owing to his wife while sole; *Woodward* v. *Darcy*, Plow. 184; *Miles* v. *Williams*, 1 P. W. 253; see also 1 Lord Raym. 520; as may one of several partners in trade, a debt owing to the firm; (*vide ante*, Vol. 7, p. 16); the power to release being in both these instances incidental to the power to receive, which is possessed by the husband and partner. So, one of several executors is

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* As to the doctrine that a deed cannot be varied by a parol agreement, *vide Thompson* v. *Brown*, 1 J. B. Moore, 358; *Cordwent* v. *Hunt*, 2 J. B. Moore, 660; overruling *Hotham* v. *East India Company*, 1 Doug. 272.

† In this case parol declarations by a testator, that he did not intend to call for a bond debt owing by a legatee, was held to be inoperative to release the obligor. See also *Aston* v. *Pye*, 5 Ves. 350, 354; *Eden* v. *Smyth*, 5 Ves. 341. In *Gilbert* v. *Wetherell*, 2 Sim. & Stu. 254, a debt owing on a promissory note was held to be released by the destruction of the note, by the direction and in the presence of the creditor then on his death bed.

competent to release a debt owing to them in that character, each having an entire interest in, and authority over the property. Dyer, 23 b. But, if there be two executors, and one of them refuse to join in the action, upon which he is severed, he cannot, after such severance, and judgment is recovered, acknowledge satisfaction. Dyer, 319 b. It seems, that one of several administrators may release a debt due to the intestate; and the opinion expressed by Lord *Hardwicke* to the contrary, in the case of *Hudson* v. *Hudson*, 5 Bac. Ab. 700, must be referred to special circumstances. See *Williams* v. *Pen*, 5 Bac. Ab. 700; *Jacomb* v. *Harwood*, 2 Ves. sen. 267.

—One of several plaintiffs.

One of several co-plaintiffs may release the cause of action; *Arton* v. *Booth*, 4 J. B. Moore, 194; *Furnival* v. *Weston*, 7 Ib. 356; though the plaintiffs be trustees; *Bayley* v. *Loyd*, 7 Mod. 250; 1 Selw. N. P. 560; but if this power be exercised fraudulently, the Court will set aside the release. *Jones* v. *Herbert*, 7 Taunt. 421; *Mountstephen* v. *Brooke*, 1 Chitty's Rep. 390; see also *Legh* v. *Legh*, 1 Bos. & Pull. 447; *Payne* v. *Rogers*, Doug. 407; *S. C.* 1 Bos. & Pull. 448, n.

—Obligee after assignment.

In *Bower* v. *Swadlin*, 1 Atk. 294, Lord *Hardwicke* doubted whether an obligee could release a bond after assignment. It is now clear, that even at law, after an assignment of a debt of which the debtor has notice, he (the debtor) cannot accept a release from the assignor; for the act being evidently against good faith, the Court would set aside a plea founded on such a release. *Legh* v. *Legh*, 1 Bos. & Pull. 447.

—Of covenant running with the land.

Where a covenant runs with land, and the covenantee has assigned the land, it should seem that the covenantee cannot subsequently release the covenant, as the assignment has vested the entire benefit of the covenant in the assignee. But in *Middlemore* v. *Goodall*, Cro. Car. 503, it seems to have been thought that the doctrine was confined to a release after an action brought by the assignee, and that the covenantee might, before any breach or before the suit commenced, release the cause of action, *though the breach were posterior to the assignment;* but the case did not raise the point, as the release was given pending the suit by the assignee, and therefore was clearly void. The reason for such a distinction is not very apparent.

Release by trustee plaintiff, vacated at law for fraud.

In a late case, a general release by a trustee plaintiff was set aside at law under the following circumstances. Leasehold property had been bequeathed to the plaintiff, in trust to receive the rents for the benefit of the testator's children, with power to lease, which power he exercised by granting a lease to the defendants. The trustee having misapplied the rents, a bill in equity was filed against him at the suit of one of the parties beneficially interested under the will, and a receiver was appointed, who sued the lessees in the name of the trustee for non-payment of rent; the defendants pleaded a release executed to them by the trustee (who

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had absconded), pending the suit; the Court ordered the plea to be set aside, and the release delivered up to be cancelled. *Manning* v. *Cox*, 7 B. Moo. 617.

Releases, where vacated in equity.

In a Court of equity, releases are frequently set aside on the ground that they have been extorted by fraud, or extended to matters not contemplated by the releasor, or have been obtained from persons who at the time were not conusant of their rights. *Bantrey* v. *Ibson*, 1 Ch. Cas. 46; *S. C.* Freem. 179; *Gee* v. *Spencer*, 1 Vern. 32; *Broderick* v. *Broderick*, 1 P. Wms. 239; *Pascoe* v. *Pascoe*, 2 Cox, 109. An instance of relief on the ground of fraud occurs in the case of *Monger* v. *Kett*, 12 Mod. 558, where the Court relieved against a release which had been obtained by a solvent debtor upon a false representation of insolvency. In the case of *Farewell* v. *Coker*, cited 2 Mer. 353, a lady having the reversion in fee in lands under a general devise in her father's will, executed to her brother, who was tenant in tail, a general release of all the manors, &c., whereof her grandfather, father, and brother, or any or either of them, were seised in the county of D., and all the estate, right, title, interest, property, claim, and demand of her the releasor, in or to the same, by virtue of her said father's will or otherwise; she now claimed to set aside this release, alleging that it was not intended to pass the legal interest in the reversion, but merely to discharge her brother's estates from a portion to which she was entitled under an antecedent settlement. Lord *King*, though he at first thought that it sufficiently appeared that the release was executed for a particular purpose, on a re-hearing altered his decree, directing two issues to be tried—*first*, whether the releasor was apprized of her title to the reversion;—and *secondly*, whether she intended to pass it. The plaintiffs, objecting to Lord *King's* alteration in his decree, appealed to the House of Lords, who dismissed the bill.

In the case of *Ramsden* v. *Hylton*, 2 Ves. sen. 305, a general release executed by a lady to her brother, of all claims and demands by reason of the will of their mother, or of their deceased brother's or father's personal estate, or of the leases of certain collieries, *or for or by reason of any other matter or thing* except a certain bond therein recited, was held not to discharge the sister's claim to a portion under a settlement executed by their father on his marriage, of the existence of which both the releasor and releasee were ignorant.

Though the Court will not disturb an arrangement intended as a compromise of doubtful rights, especially between the members of a family, because the parties had mistaken notions of those rights, it will not permit a release to stand which has been obtained without a full and honest disclosure to the releasor of all the circumstances in the releasee's knowledge, affecting his (the releasor's) actual situation. *Salkeld* v. *Vernon*, 1 Eden, 64; *Harvey* v. *Cooke*, 4 Russ. 34. See also *Cann* v. *Cann*, 1 P. W. 728; *Cole* v. *Gibson*, 1 Ves. sen. 506; *Gordon* v. *Gordon*, 3 Swanst. 400.

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Release no bar in equity to a suit.

Of course, a release is no answer to a suit in equity impeaching accounts and transactions to which it professes to extend; and as the charges of the bill, by affecting the consideration for, impliedly deny the validity of, the release, it is not necessary to make any distinct averment of its invalidity. Lord *Clare*, (the Irish Chancellor), indeed, in one instance, held a general release to be a good plea to a bill charging error, fraud, and oppression, in regard to certain accounts and transactions between the parties; but his order was reversed by Lord *Redesdale;* which reversal was affirmed by the House of Lords, after an able exposition by his Lordship of the principles on which his order of reversal had proceeded. *Roche* v. *Morgell*, 2 Scho. & Lef. 721. See also *Salkeld* v. *Science*, 2 Ves. sen. 107.

Stranger to a deed cannot sustain an action on it.

On the general principle, that a stranger to a deed cannot take the benefit of it, covenants in an indenture entered into with persons who are *not parties*, confer *no* right of action on such persons; and where a deed is expressed to be made between parties, the persons so named alone are parties to the instrument.

Covenantee must be a p rty.

Thus, where an indenture of charter-party was made between A. and others, owners of a ship called E., whereof B. was master, of the one part, and C. of the other part; in which indenture A. covenanted with C. and B., and C. covenanted with A. and B., and the conclusion of the indenture was as follows:—"In witness whereof the parties abovesaid have put their hands and seals;" it was held, that though B. had executed the indenture, yet, not being a party to it, he could not release an action brought upon the indenture by A., for that this was an indenture reciprocally made between parties of the one part and parties of the other part; in which case no obligation, covenant, or grant, could be made with any person who is not a party to the deed. But, where the indenture is not mutual, but is without the words "between &c., as to all persons &c.," there an obligation, covenant, or grant can be made to other persons. 2 Roll. Ab. 22, (F.), pl. 1. See also *Scudamore* v. *Vanderstene*, 2 Inst. 673.

Covenant cannot be made with a stranger.

So, in the case of *Cooker* v. *Child*, cited 3 Lev. 139, where an action was brought upon an indented charter-party, which witnessed that A., master and part owner, with the consent of B., the other part owner, let the ship to C. for such a voyage, and C. covenanted with A., and also with B., to pay 300*l.*, B. brought an action upon this covenant, to which C. pleaded, that only himself and A. were parties to the indenture; and this plea was held good on demurrer, by *Hale* and all the rest of the Court, on the ground that a covenant in an indenture could not be made with a stranger.

Again, in the case of *Offly* v. *Ward*, cited 3 Lev. 140, where, in an action of debt by A. upon a single bill made to A. by the defendant, to the use of A. and B., A. brought an action, and the defendant pleaded

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a release by B., and it was adjudged to be no bar, for, he being a stranger to the bill, could not release it, though it was made to his use*.

So, in the case of *Gilby* v. *Copley*, 3 Lev. 138, where articles of agreement under seal were made between A., on behalf of B. (the plaintiff) and others, of the one part, and L. (the defendant), of the other part; by which A. covenanted that the defendant should enjoy a certain close for eight years, at a rent; and the instrument also recited, that A. had sold to the defendant four hundred and forty-eight sheep belonging to B., as executrix of her father; and the defendant then promised, (without saying to whom), to pay to B. 210*l.* for the sheep, on the 16th of June then following: B. brought an action on this promise. The defendant demurred, alleging that the action ought to have been brought in the name of A., the plaintiff being no party, and therefore incompetent to sue for or release any benefit under the articles, as she might have done if it had been by way of deed-poll, or not between parties. Three of the Justices, however, (*Jones*, *Charlton*, and *Windham*), thought that the action would lie, the deed being made for the benefit of B., and not by indenture, and therefore not working an estoppel; but *Levins*, J., said, that the indenting or not indenting was not material, but party or no party was the question; it was common learning, that one who was not a party to a deed made between parties, could not take by the deed, unless by way of remainder. The argument, however, was adjourned, and the case appears never to have been decided. In a more recent case, (*Ex parte Richardson*, 14 Ves. 187), Lord *Eldon* was clearly of opinion, that a covenant made with a party to the deed, for the use of another not a party, could not be considered as a covenant with the latter.

Action by several partners, one of whom executed a composition deed, bad.

And in further accordance with this rule, the Court of King's Bench, in the case of *Metcalfe* v. *Rycroft*, 6 Mau. & Selw. 75, decided that an action of covenant could not be maintained in the joint names of several partners, one of whom had executed a composition deed with a debtor of the firm, the indenture being made in the usual manner, between the debtor, of the one part, and the creditors, whose names and seals were set and subscribed, of the other part; and therefore, though the covenant was made in express terms with the executing creditors and their partners, and though the partner signed in the name of the firm, it was held, that the non-executing partner, being no party, ought not to have been joined in the action. And lastly, the principle in question was recognised in the late case of *Doe* d. *Bedford* v. *White*, 12 J. B. Moore, 526, where it was admitted by more than one of the learned Judges, that a right of re-entry in a lease could not be reserved to a person who was not a party to the deed. See also *Berkeley* v. *Hardy*, 8 Dowl. & Ryl. 702; *S. C.* 5 Barn. & Cress. 355; *ante*, Vol. 1, p. 19, 2nd ed.

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* As to parol promises to the use of a third person, see 3 B. & P. 149, n.

Covenantor bound, though not a party.

But the rule in question applies only to the covenantee, and not to the covenantor; for a person will be *bound* by a covenant in a deed executed by him, though he is not mentioned in the exordium as one of the parties to it. And therefore, where articles of agreement under seal were made between A., of the one part, and B. (without saying, of the other part), whereby A., for himself, his heirs and assigns, did let a house, called &c., unto the said B., for the yearly rent, &c. The instrument then proceeded as follows:—"And, that the said rent may be satisfied as aforesaid, be it known unto all men, that I, C., do covenant for myself, &c., on the behalf of the said B., that is to say, that the said B. shall pay the rent and perform the other covenants." In an action brought against C., it was contended for him, that he was not bound by this covenant, because he was not a party to the deed: but *Holt*, C. J., held, that, though one party to a deed could not covenant with another who was no party, but a mere stranger to it, *yet one who is no party to a deed may covenant with another who is a party*, and thereby bind himself, by sealing the deed. *Salter* v. *Kidgly*, Carth. Rep. 76.

Release cannot be pleaded by a person who is not a party to it.

The same principles which apply to deeds of covenant are applicable to releases; for it has been decided, that a release made between certain parties, cannot be set up against the claims of the releasor by a third person who is no party, though it professes to discharge him from those claims. And therefore, where, in an action brought upon a charter party, the defendants pleaded a release, sealed with the seal of the plaintiff, by which he released the defendants from the covenants of the charter party, and all claims and demands in respect thereof; and the plaintiff replied to this plea, that the release was made between the plaintiff and third persons, and the defendants were no parties to it, but wholly strangers, this replication was held to be good upon demurrer. Lord *Ellenborough* observed—"The objection is this, that where there is such a deed as is technically called a deed *inter partes*, that is, a deed importing to be between the persons who are named in it as executing the same, and not, as some deeds are, general to 'all people,' the immediate operation of the deed is to be confined to those persons who are parties to it; no stranger to it can take under it except by way of remainder, nor can any stranger sue upon any of the covenants it contains. For this position, 2 Inst. 673, and several other authorities to which we have referred, were cited; and the same doctrine occurs in Co. Litt. 231. a. The defendants' counsel did not deny these cases, but he denied their application to a release; and he brought under our notice Cro. Eliz. 905, and Noy, 49, where, in an indenture of feoffment, between A. of the one part, and B. of the other, a letter of attorney to a stranger to the indenture to deliver seisin was adjudged good. A letter of attorney, however, passes no interest, but merely gives an authority, and such authority is essential to effectuate the conveyance from A. to B. But the release in this case, if it is

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to operate as a release, takes something out of the plaintiff, viz. his right to sue, and passes to the defendants an indemnity and bar against the plaintiff's claim. *This case, therefore, appears to us within the general rule, and not within the excepted case.*" *Storer* v. *Gordon*, 3 M. & S. 308.

Applying to releases the principle of the distinction stated by Lord *Holt* in *Salter* v. *Kidgley*, (*ante*, p. 415), in regard to *covenants with* and *covenants by* strangers, it should seem that though a release cannot be taken advantage of by a person who is no party, yet, that an instrument of this kind may operate as the release of any person who has executed it, though he were not a party; or, in other words, that the releasor need not, though the releasee must be a party.

However, before a conclusion is formed in *any* case that an instrument has failed of effect because made for the benefit of a person who is not a party, it will be proper to scrutinize the context, bearing in mind the readiness of the Courts to supply omissions, when there is reason to infer that they have resulted from clerical inadvertence, and not from design.

Release of right does not require words of limitation.

A release of a right in lands to a person seised in fee simple need not be made to the heirs of the releasee; for if the release were made to him for one day, or one hour, it is as good as if it were made to the releasee and his heirs; for, when the right has once gone from him by his release, without any condition, &c., to him that hath the fee simple, it is gone for ever. Co. Litt. 274.

A release to several discharges them from claims against them respectively.

A release to A. and B. of all actions which the releasor has against them, *or either of them*, extends to actions against the releasees *severally* as well as jointly; 2 Roll. Ab. 414 (K), pl. 2; and even without the words "or either of them," the construction it seems would be the same. 2 Roll. Ab. 414 (K), pl. 4; Lord Raym. 235; Shepp. Touch. 344.

—to one of several co-debtors, discharges all.

A release to one of several co-debtors discharges all, though they are *severally* as well as jointly bound; for "in such a case the joint remedy being gone, the several is so likewise. 5 Bac. Ab. 702; 2 Roll. Ab. 412 (G.) pl. 5; Co. Litt. 232. a.; *Dennis* v. *Payn*, Cro. Car. 551. See also *Payler* v. *Homersham*, 4 M. & S. 427; *Rex* v. *Bayley*, 1 C. & P. 435. And the doctrine holds in regard to releases by operation of law, (as to which *vide ante*, p. 405), as well as to releases by deed; Co. Litt. 264. a.; *Cheetham* v. *Ward*, 1 Bos. & Pull. 630; and in equity as well as at law, *Bower* v. *Swadlin*, 1 Atk. 294; (though it will be remembered that every release at law is not a release in equity; (*vide ante*, p. 405); and a proviso introduced into a deed of release, that the co-debtor shall not take advantage of the release, would be repugnant and void. *Everard* v. *Herne*, Lit. Rep. 190. But a proviso that a release shall not extend to prejudice or affect any claims which the releasor may have against the releasee jointly with a third person, is a valid qualification of the release; for the effect is not (as it would be in the instance just mentioned) to discharge the releasee and not the co-debtor (which is an impracticable object), but

merely to take the joint debts altogether out of the operation of the release: and therefore, to an action brought against the releasee and his co-debtor jointly, the release is by its express terms no bar. *Solly* v. *Forbes*, 4 J. B. Moore, 448.

Covenant not to sue, does not discharge a co-debtor.

It is to be observed, that the rule, that a release to one of several co-debtors discharges all is confined to a release, properly and technically so called; for a perpetual covenant not to sue, which (we have seen) operates as an absolute release of the covenantee, will not discharge a co-debtor; *Lacy* v. *Kinaston*, 12 Mod. 548; *S. C.* 1 Lord Raym. 688; *Dean* v. *Newhall*, 8 D. & E. 168; though the debt of the covenantee and the third person is joint only, and not joint and several. This important point was decided in the case of *Hutton* v. *Eyre*, 6 Taunt. 289, where A. and B., being partners in trade, dissolved their partnership as from a future day, and agreed that neither of them should make any farther purchases on the joint account. In violation of this agreement, B., before the day, contracted debts with C. and four others, on the partnership account, and afterwards compounded with his creditors. The deed of composition was executed by the five creditors, and contained a covenant by the creditors generally not to sue the debtor for any debt or sum of money then due, and that, if they did, those presents should be a sufficient release. The five creditors received a dividend, and then called on A. for the residue. A. now sought to recover the sum so paid from B., who resisted the demand on the ground that the covenant in the deed of composition executed by the creditors operated as a release of both A. and B., and that therefore A. had paid the money in his own wrong; but it was held, that the covenant not to sue B. did not operate as a release of A.: for that the doctrine that the covenant not to sue is a release, being merely designed to avoid circuity of action, *only applied as between the covenantor and covenantee singly, and did not operate to discharge a third person who was liable jointly with the covenantee.*

If two tenants in common grant a rent of 40*l.* to A., of course a release to one of them would extinguish but 20*l.*, as the grant is in judgment of law several. Shep. Touch. 344.

Rule where the releasor has demands against the releasee in several rights.

3. *To what Demands Releases extend, both as to their Nature and Time of becoming due.*]—Where the releasor in his own right, as well as in the right of another, has demands against the releasee, the question is raised, unless precluded (as it ought always to be) by an unequivocal expression of the intention, whether the release extends to both or one only of these species of demands.

A release by an executor or administrator, (but without designating him as such), seems, by the better opinion, to be confined to claims in his own right, unless he has no other claims than those which pertain to him in the representative character. Such at least is the doctrine maintained in some of the cases. Thus, in the case of *Knight* v. *Cole*, Carth. 120, *S. C.*

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3 Lev. 274, where the releasor had a demand in his own right, and another as executor, against the releasee, the Court observed, that no mention was made of releasing any suit which the releasor had in right of his executorship; therefore, those words should not extend to any demand he had in that capacity, *since he at that very time had one demand in his own right.* The case, however, was partly decided upon another point. See also *Payler* v. *Homersham*, 4 M. & S. 423, *post*, p. 422. So, in the case of *Hutchinson* v. *Savage*, 2 Ld. Raym. 1306, where, in an action by an administrator, the defendant pleaded a general release of all debts, duties, and demands; to which the plaintiff replied, that, at the making of the release, (which it seems the plaintiff had executed as one of the general creditors of the defendant), the defendant was indebted to him in his own right in the sum of 6*l.*, and that he gave the release in respect of that debt; but the defendant's counsel contended, that such general release discharged the debt due to him as administrator, and cited Roll. Ab. 404. For the plaintiff, however, it was urged, that the case in Rolle had been held not to be law; and that it was certain that if a man grants *omnia bona sua*, goods which he has as administrator do not pass; and that if the release in this cause had nothing to work upon, then perhaps it would have released this debt due to him as administrator; but as the case was, it should enure upon the debt due to him in his own right. *Powell*, J., (though he seems on another occasion to have advanced, or at least to have concurred in, a different statement of the rule, see *Thorpe* v. *Thorpe*, 1 Lord Raym. 235), said, that the case in Ro. Abr. was taken out of the Year Book of Edw. 3, (39 Edw. 3, 96), at which time the law was, that a grant of *omnia bona sua* by an executor or administrator, passed goods which he had as executor or administrator, but now that case is held contrary; and there is no difference between a grant and a release; therefore, that case of a grant of *omnia bona sua* will govern this present case: *but if there had been no other debts for the release to work upon, then it had released this debt.* And *Holt*, C. J., seems to have concurred in the concluding position of his learned brother's argument; for he observed, "if he have no goods but as administrator, they must pass by a grant of *omnia bona sua.*" The case, however, was adjourned, and it does not appear what was the ultimate decision. On the other hand, it is broadly laid down in some respectable text writers, that "if an executor releases all actions, this will extend as well to actions which he hath in his own right, as to those which he hath as executor." 5 Bac. Ab. 700, citing 39 Edw. 3; Shep. Touch. 345.

General conclusion from the cases.

Though the cases of *Cole* v. *Knight*, and *Hutchinson* v. *Savage*, are not, it must be admitted, a complete adjudication of the point, yet the reasonableness of the rule they support appears likely to insure its adoption at the present day, in opposition to the doctrine just quoted, which seems to be founded exclusively on the passage in the Year Books, and would generally, it is conceived, conflict with the intention.

Release expressly in a particular right.

At all events, it is not to be doubted, that a release made expressly in a particular right or capacity, is restricted in its operation to demands arising in such right or capacity; and therefore, where A. executed to B. a release of all actions which A. had against B. *on his own account*, it was held, that this did not discharge a bond which the releasor, jointly with another *as trustees*, had taken from the releasee; for that *these words could only have been put in to distinguish demands which A. had in his own* right, from those he had in right of or in trust for others. *Stokes* v. *Stokes*, 1 Lev. 272; *S. C. nom. Nokes* v. ———, 1 Vent. 35. This case seems to overrule a position much cited in the early books, that if "a man makes a release to another by the name *of executor of J. S.*, this will release all actions which he hath *in his own right*, as well as those which he hath as executor; 2 Roll. Ab. 414 (A), pl. 5;" which is not only inconsistent with the case in question, but evidently contravenes the rule *expressio unius est exclusio alterius*.

Accessory follows principal.

In a release of the principal the accessory is included; and therefore a release of all debts or duties will operate as a discharge of all actions, judgments, executions, and obligations; Shep. Touch. 342; 2 Roll. Ab. 410 (B), pl. 2; and a release of judgments will extend to an execution. Shepp. Touch. 343. So, a release of covenants would operate to discharge a bond given for the performance of those covenants; *contrà*, it seems, if the bond had been forfeited by the breach of the covenants *previously* to the release being given. *Reade* v. *Bullocke*, Dyer, 56 b*.

Rent-charge extinguished by a release of *part* of the lands.

If a man be bound to perform two things, the covenantee may discharge one of them; but an entire thing cannot be released in part. 3 Bulst. 232. And here it should be observed, that if the owner of a rent-charge issuing out of twenty acres releases all his right to one acre, the rent is extinguished in the whole. 2 Roll. Ab. 414; Co. Litt. 148; Shepp. Touch. 345. And on the same principle, if the grantee of a rent-charge acquire as purchaser part of the land out of which it issues, the rent is gone *in toto*, "because the rent is entire and against common right, and therefore by purchase of part it is extinct in the whole, and cannot be apportioned;" Co. Litt. 148. a.; but if the grantee of a rent-charge releases part of the *rent*, such release operates *pro tanto* only, and does not extinguish the whole rent. 5 Bac. Ab. 694.

Execution, when released.

It is clear that a release of all suits will extend to an execution, because an execution cannot be had without application to the Court, which is the "suit" of the party. 8 Rep. 153 b. But a release of all actions is no bar of an execution, "which is not an action, but begins when the action ends." Co. Litt. 291. a.

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* As to bonds given for the performance of covenants which are contained in indentures, which turn out to be void *in toto*, see *Jevons* v. *Harridge*, 1 Sid. 308; *Capenhurst* v. *Capenhurst*, 1 Lev. 45.

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Judgment, when released.

But if a creditor by judgment or statute release to his debtor all his right, interest, or demand in the lands generally, or any particular lands of the debtor, he may notwithstanding afterwards sue out execution against the lands, for he had no right or demand in or upon the land at the time of the release. *Barrow* v. *Gray*, Cro. El. 552; see also 2 Roll. Ab. 405 (T), pl. 6; 2 Lev. 215. But a release after execution levied would discharge the land; and in such case a release of part of the land extended would operate as a release of the whole, for it would be a discharge not merely of the land expressed to be released, but of the execution. And. 266; 5 Bac. Ab. 713. This doctrine often comes under consideration in practice, when it happens that a creditor, having a docketed judgment, is willing to discharge particular lands about to be conveyed to a purchaser or mortgagee from his lien, provided he could do so without prejudice to his claim on the rest of his debtor's property—objects which the doctrine in question shews to be incompatible. If the lands intended to be exonerated are subject to the usual limitations to prevent dower, the difficulty may now be avoided by making the donee exercise his power of appointment in favour of the purchaser or mortgagee. *Vide ante*, Vol. 7, p. 382.

Particular lands cannot be discharged from judgment.

As to demands not due at the time of the release.

It should be observed that a release of all demands is confined to demands existing at the time of the release, and therefore does not extend to a covenant then unbroken; for, before the breach, there is no "demand;" *Hawle* v. *Kirkeby*, Moore, 34, pl. 112; *S. C.* Dy. 217 b; *Carthage* v. *Manby*, 2 Show. 90; *Belcher* and *Hudson's case*, Shepp. Touch. 344; *Thorpe* v. *Thorpe*, 1 Ld. Raym. 235, 662; *S. C.* 1 Salk. 171; *contrà*, if the release be expressly of *covenants*. *Hancock* v. *Field*, Cro. Jac. 170; 2 Roll. Ab. 407, pl. 21. So, a release of all demands will not discharge a legacy payable at a future day; see *Lampet's case*, 10 Rep. 46. b.; *contrà*, if the release be expressly of *legacies*. Dy. 56; Co. Litt. 76. Where the demand in question arises out of the agreement under which the release is executed, and is part of the consideration for the release, of course the release cannot be set up as a bar to such demand. *Porter* v. *Phillips*, Cro. Jac. 623; *Thorpe* v. *Thorpe*, 1 Ld. Raym. 235, 662.

Effect of release on unaccrued *rent*.

As to the effect of releases upon *rents*, the early books present many distinctions. Thus it is laid down, that a release of all *demands* will extend to a rent-charge, or to a rent-service, parcel of a seigniory in gross. *Witton* v. *Bye*, Cro. Jac. 486; see also 2 Roll. Ab. 408. While, on the other hand, it is clear that it will not extend to a rent incident to a reversion of lands, *i. e.* to a rent reserved upon an ordinary lease for years. Thus, where an action was brought on a lease for years, for a year's rent due at Lady-day, 1689, and the defendant pleaded a release of all demands, dated 18th Nov. 1688: it was held, that the release extended to discharge the first half year's rent then over due, but not that of the second or current half year, which was not then demandable. *Stephens*

v. *Snow*, 2 Salk. 578; see also *Henn* v. *Hanson*, 1 Lev. 99; *Ingram* v. *Bray*, 2 Lev. 210.

Release of *actions*, how construed.

Even admitting that a release of all *demands* would now be held to extend to a rent-charge or annuity, (which is doubtful), it is clear that a release of all *actions* merely would not; *Tuke* v. *Cheek*, Cro. El. 897; *Diggs's case*, Moore, 133; or at least would apply only to the arrears then actually accrued; 2 Roll. Ab. 404; as the word *actions* in these cases is construed as synonymous with *existing causes of action*. Shepp. Touch. 339. And therefore, a release of all actions will not discharge a sum of money not due at the time, Co. Litt. 292; unless, indeed, (according to a distinction more technical than solid, but much insisted on in the early cases), in the instance of a bond, which, being *debitum in præsenti*, though *solvendum in futuro*, it is said, is discharged by a release given before the day of payment appointed by the condition. Co. Litt. 291; *Altham's case*, 8 Rep. 153; *Cage* v. *Acton*, 1 Ld. Raym. 519. Clearly, however, it would not extend to a covenant not then broken, there being no cause of action until a breach. See *Hoe's case*, 5 Rep. 71. Though it is not certain that all these distinctions would now be adopted, yet persons drawing releases ought not to lose sight of them, but expressly qualify or enlarge the terms of the instrument, so as to exclude doubt.

Whether it operates up to the date or delivery.

A release of all demands up to the *making* of the release will extend to a cause of action arising in the interval between the date and delivery. *Hedley* v. *Joans*, Dyer, 307 a. But *contrà*, if it be, in the usual form, of all demands up to the day of the *date* of the release; its operation being then confined to the date. And therefore, where A., on the 1st of June, executed to B. a release dated on the 1st of March, of all demands up to the date, it was held that it did not release an obligation executed and dated on the 1st of May. *Drury's case*, Cro. Eliz. 14; see also Roll. Abr. 410, (A), pl. 5.

Day of the date excluded.

And the computation in such cases is *exclusive* of the day of the date. Thus, in trespass, assault, and battery, the defendant pleaded a general release of all actions, &c., from the beginning of the world *usque ad diem datûs* of the said release; and it happened that the battery was done upon that very day in which the release is dated; wherefore, it was held that this action was not discharged, for the release did not include that day. *Dixon* v. *Terry*, 3 Mod. 182; 5 Bac. Ab. Gwill. ed. 712. So, in the more recent case of *Roche* v. *Morgell*, 2 Scho. & Lef. 730, Lord *Redesdale* seems to have considered, that a release of all demands "unto" a certain day, did not include transactions *on* that day. From the statement of the case, however, it appears that the deed distinctly recited an intention to include the transactions of that day—a fact which is not adverted to, and was probably overlooked by his Lordship, who, indeed, was not driven to this line of reasoning at all, as the transactions then under his Lordship's consideration were expressly excepted out of the release. There can be no

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doubt that the recital of an intention to include transactions occurring on the day of the date, would be a ground for giving to the deed this extended operation, as will be shewn more fully in the next section.

Whether general words are restrained by the recital.

4. *Whether the General Words of a Release are restrained by the Recital.*]—It is a long-established rule in the construction of releases, that the general words of the instrument are liable to be restrained by the recital. Thus, it is laid down, that, if a man receive 10*l.* from another, and by his deed acknowledges the receipt of it, and acquits and discharges him therefrom, and from all actions, suits, debts, duties, and demands; by this release nothing is released except the 10*l.*, for the latter words have reference to the first, and are limited by them. *Per Tanfield*, 2 Rolle's Ab. 409, (A), pl. 3. So, where A. recovered against B. a judgment for 6000*l.*, and made J. S. and J. D. his executors, and died; B. made C. his executor, and devised a legacy of 5*l.* to J. D., and died; J. D. by deed acknowledged the receipt of the 5*l.* for the legacy from C., and thereby released the said legacy, *and all actions, suits, and demands which he had against C., as executor of B.*, for any matter whatsoever; it was adjudged, that the general words of the release were restrained to the particular occasion, and extended only to the legacy of 5*l.*, and not to the judgment. *Knight* v. *Cole*, Carth. 119; Show. 150; 3 Lev. 269; 3 Mod. 277. See also *Morris* v. *Wilford*, 2 Lev. 214; *Thorpe* v. *Thorpe*, 1 Lord Raym. 235. The principle was recognised in the more recent case of Lord *Braybroke* v. *Inskip*, 8 Ves. 423, where a release of all claims out of the real and personal estate of a testator was held not to include the moiety of a reversion derived under the will, the recitals disclosing an intention to release a debt only, and not referring to that part of the will which related to the reversion. See also *Ramsden* v. *Hylton*, 2 Ves. sen. 310.

The leading modern authority for this doctrine is the case of *Payler* v. *Homersham*, 4 Mau. & Selw. 423, where the question was, whether a joint and several bond given by the defendant and others to the plaintiffs, who were bankers, conditioned for the payment of monies which they should advance to A., was discharged by a release contained in a general composition deed executed by the plaintiffs, as creditors of the defendant. The deed recited, that the defendant stood indebted to his creditors in the several sums set opposite to their respective names, and that they had agreed to take of him 15*s.* in the pound upon the whole of their respective debts; and then the creditors, in consideration of the said 15*s.* in the pound, paid to them before the execution of the release, respectively released the defendant from all manner of actions, debts, claims, and demands at law and in equity, which they, or any or either of them had against him, or thereafter could, should, or might have, by reason of any thing from the beginning of the world to the date of the release. Against the plaintiffs' name was set the sum of 2148*l.* 1*s.* 9*d.*,

which was the amount of their demand against him on their own account; but no notice was taken of the demand on account of the bond, though at that time a considerable sum of money was due thereon. The defendant principally relied on a *dictum* of Lord *Holt*, in *Knight* v. *Cole*, 1 Show. 154, denying the position of *Tanfield*, J., (quoted *ante*, p. 422), to be law, and which, it was said, was adopted only by *Gregory*, J. But the Court held that the release was no bar to the action on the bond. Lord *Ellenborough* said—"I do not find that Lord *Holt*, when he denied the authority of the case from Rolle's Abr., denied also the position of *Gregory*, J., that the general words of a release may be restrained by the particular recital; common sense requires that it should be so; and, in order to construe any instrument truly, you must have regard to all its parts, and most especially to the particular words of it. I am sorry, therefore, to find that the case cited from Lord *Rolle* was said not to be law, because it seems to me to be as sound a case as can be stated. The argument for the defendant is, that this not only releases him from the obligation, but his sureties also; but the replication avers, that the monies secured by the bond were not included, or intended to be included, in the release; which averment, if it is competent to the plaintiffs in law to make, puts an end to the question. And surely, the release being of an aggregate sum, which is compounded of several debts, the plaintiffs may aver of what it is or is not compounded." Mr. Justice *Bayley* observed —"There is no doubt but a particular recital in a deed will restrain the general words." See also *Fennell* v. *Day*, cit. 3 Moo. & Pay. 84. (As to the construction of composition deeds between debtor and creditors, *vide post*, p. 424).

Parol evidence not admissible to vary the construction.

Parol evidence, it is clear, is inadmissible to enlarge or vary the construction of a deed of release. Thus, where A., the mother of B., having, on the 26th April, 1800, entered into a bond, on his behalf, for 1000*l.*; B. executed an indemnity bond, of the same date, in the sum of 2000*l.*, conditioned for the payment of 1000*l.* three months after her decease; on the 9th February, 1801, A. made a codicil to her will, by which she relinquished two debts due from B., one of 1000*l.* and one of 500*l.*, and desired him to be punctual in indemnifying her estate against the 1000*l.* bond of the 26th April; three days after the execution of this codicil, A. executed a release to B., in which, after mentioning a sum of 500*l.*, for which she had his bond, and two sums of 480*l.* and 300*l.*, due to her from B., for which she had receipts, it was recited, that she had agreed to release B. from those sums, "and of and from all or any other sum or sums of money, claims, and demands, thereby secured or intended to be secured, *and all other sum or sums of money, claim, and demand whatsoever.*" The deed then released him accordingly from those sums, and all claim on account of those sums, "*or for or on account of any other matter, cause, or thing whatsoever.*" It was held, 1*st*, that this release did not extend to the indemnity bond; and, 2*ndly*, that no extrin-

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sic evidence could be admitted to explain the intentions of A. as to the release. *Butcher* v. *Butcher*, 1 Bos. & Pull. New Rep. 113. But, of course, the rule excluding parol testimony of intention to enlarge or restrain the terms of a deed of release, does not preclude its admission to explain the state of the facts between the parties at the time, and on which the extent of its operation must frequently depend. This is a distinction familiar in its application to wills, and equally holds, though it does not so often occur, in relation to instruments of every other description.

III. Composition Deeds.

1. *Their Nature and Operation, in General.*

General observations on composition deeds.

In order to avoid the expense and notoriety attending a commission of bankrupt, creditors frequently arrange among themselves for the discharge of their insolvent debtor from his engagements, and the distribution of his property—the two objects attainable by a bankruptcy. Compositions have sometimes been reprehended as private bankruptcies, having all the mischief and none of the advantages of a commission; the old creditors, it is said, are benefited, and the new creditors defrauded. See *Ex parte Vere*, 1 Rose, 283; 19 Ves. 101; Mont. on Composition, 39. But though undoubtedly a commission affords more efficient means of detecting fraud than a private composition, yet the sweeping censure here bestowed on the latter is scarcely sustained by experience; which has shewn, that, in the hands of honourable men, the affairs of an embarrassed trader may sometimes be wound up under a private arrangement, more advantageously than by means of a commission, and with far less of personal mortification to the man whom misfortune, and not delinquency, may have reduced to the humiliating condition of seeking the indulgence of his creditors; and these considerations, probably, had some weight in inducing the protection of the Legislature, which has been partially extended to composition deeds in the late bankrupt act, (6 Geo. 4, c. 16): the 4th section of which provides, "That, where any such trader shall, after this act shall have come into effect, execute any conveyance or assignment, by deed, to a trustee or trustees, of all his estate and effects, for the benefit of all the creditors of such trader, the execution of such deed shall not be deemed an act of bankruptcy, unless a commission issue against such trader within six calendar months from the execution thereof by such trader; provided that such deeds shall be executed by every such trustee within fifteen days after the execution thereof by the said trader; and that the execution by such trader, and by every such trustee, be attested by an attorney or solicitor; and that notice be given within two months after the execution thereof by such trader, in case such trader reside in London, or within forty miles thereof, in the London Gazette, and also in two London daily newspapers; and in case such

Stat. 6 Geo. 4, c. 16.

Conveyance of effects for the benefit of creditors, not an act of bankruptcy, when.

trader does not reside within forty miles of London, then in the London Gazette, and also in one London daily newspaper, and one provincial newspaper published near to such trader's residence; and such notice shall contain the date and execution of such deed, and the name and place of abode respectively of every such trustee, and of such attorney or solicitor."

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This enactment, it will be observed, requires that the conveyance should be of *all* the debtor's estate, and for the benefit of *all* his creditors; and even then it protects the deed only after the expiration of six calendar months, leaving it in the meantime exposed, as formerly, to the risk of being overreached by a commission of bankrupt, notwithstanding that the requisitions of the statute have been complied with, by giving notices, &c. Until this period has elapsed, therefore, a marketable title cannot be made by the trustees to the debtor's property.

Effect of bankruptcy upon composition deeds.

If a composition deed is wholly void, by reason of a prior act of bankruptcy, a creditor who has executed and received a dividend under it may become a petitioning creditor in respect of his original debt, because that debt is not extinguished by the void deed. *Doe* d. *Pitcher* v. *Anderson*, 5 Mau. & Selw. 161. But a creditor who has executed or assented to a deed conveying all the debtor's effects, cannot set up that deed as an act of bankruptcy on which to ground a commission against him. *Bamford* v. *Baron*, 2 Durn. & East, 594, n.; *Back* v. *Gooch*, 4 Camp. 232.

General principles of law applied to composition deeds.

Courts of law have evinced a strong anxiety to give the fullest scope and effect to composition agreements, and their vigilance has been principally directed to the three following objects:—1*st*, The enforcement of the creditors' adherence to their engagement suspending or extinguishing the right to sue; 2*ndly*, The exacting from the debtor the performance of his part of the agreement, and, in some instances, following his default with a revival against him of the original demands for which such agreement was substituted; and, 3*rdly*, The invalidating secret agreements between the debtor and particular creditors at variance with the spirit of the general arrangement.

What agreements are binding on creditors

Technical rules and distinctions have been very reluctantly applied to composition agreements, where they would have interfered with the operation of those agreements, and defeated the substantial justice of the case. Thus, though, by the rules of pleading, accord without satisfaction is a bad plea; and, therefore, an agreement not under seal, and without consideration, to accept a certain sum in satisfaction of a larger, is *nudum pactum;* under which rule, in several cases, an agreement to accept a composition was held to be no bar to an action; (see *Cumber* v. *Wane*, 1 Stra. 426; *Heathcote* v. *Crookshanks*, 2 Durn. & East, 24; *Lynn* v. *Bruce*, 2 H. Black. 317; *Fitch* v. *Sutton*, 5 East, 230); yet, the doctrine was subsequently much narrowed; for, not only has it been decided, that the junction of a surety in the agreement is sufficient to render it mutual, by constituting an equivalent or compensation for the engagement of

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the creditors, *Steinman* v. *Magnus*, 11 East, 390; but it has even been held, that a consideration for the execution by each creditor arises out of the fact of its execution by all the rest. *Boothby* v. *Sowden*, 3 Camp. 175. In the recent case of *Good* v. *Cheesman*, 2 Barn. & Ad. 328, an agreement was sustained against the objection of want of mutuality, on account of its containing a mutual agreement for forbearance on the part of the creditors, though, as the debtor had stipulated to give up a portion of his property, it was not necessary to resort to this reasoning; since it was always held, that if the debtor assigned, or agreed to assign, his property to the creditors, this was a consideration moving from him sufficient to render the agreement mutual; *Butler* v. *Rhodes*, 1 Espin. 236; see also *Heathcote* v. *Crookshanks*, 2 Durn. & East, 24; and if the payment had been made under the agreement, the objection was equally precluded. *Cooling* v. *Noyes*, 6 Durn. & East, 263.

Conditional release void unless condition be complied with.

A man, of course, has a right to annex what conditions he pleases to the indulgence or bounty which he voluntarily extends to another. And therefore, if creditors compound with their debtor conditionally on certain terms, the non-performance on his part of those terms will revive their original demands. Thus, where A. having agreed with his debtor to take a sum of money less than his debt, so as it was paid precisely by such a day, and, the debtor failing in payment, filed a bill in Chancery, alleging that he tendered the money within a day or two afterwards, but the defendant had refused to accept it, and sued for the whole at law: the defendant demurred, insisting upon his right to restrain and qualify an agreement in favour of the plaintiff as he thought fit, and that the failure of payment on the day had discharged him from the agreement; and this demurrer was allowed by the Lord Keeper, with the observation *cujus est dare ejus est disponere*. *Sewell* v. *Musson*, 1 Vern. 210. See also *Ex parte Vere*, 19 Ves. 93, and Lord *Hardwicke's* judgment in *Leigh* v. *Barry*, 3 Atk. 583.

Distinction.

But it seems, that if a consideration moved from the debtor to the creditor, rendering the transaction not a conditional release, springing from the voluntary bounty of the creditor, but a mutual contract between the parties, the Court will relieve against a forfeiture, by reason of non-payment on the day. *Rose* v. *Rose*, Ambler, 331.

Effect of dishonour of a bill for composition in reviving right of action.

If the composition dividend be secured by a bill of exchange, the creditor is not remitted to his original remedy by the acceptor's neglect to pay it, until resort has been had in due course to the several other persons liable on the bill, according to the rules applicable to such negotiable instruments. Thus, where a creditor agreed to accept 5*s*. in the pound, to be secured by the acceptance of the debtor's brother, and the creditor on receiving the bill from the debtor gave him a receipt in full of all demands, and which expressed, that unless the dividend were duly paid, it was to be null and void; and the bill being dishonoured by the acceptor, the creditor, without applying to the defendant, who was the drawer, brought the present ac-

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tion for his original demand, though the amount of the dishonoured bill was tendered to him on the day following its dishonour. The Court held, that, under the circumstances, the action could not be maintained. *Gibbs*, C. J. said—"If, as in this case, a person had agreed to pay 10*l.* in satisfaction of a former or larger debt on a given day, it would be incumbent on him to tender the money on that day; if not, the party who was entitled to receive it, might have recourse to his original demand; but here the plaintiff agreed to take a negotiable security, drawn by the defendant, his original debtor, on his brother, payable to his own order, and indorsed by him to the plaintiff, who might have indorsed it over to another person. In short, there might have been a number of subsequent indorsements. The plaintiff consented to take this composition-bill in lieu of the original note, and having so done, the former instrument became subject to the law applicable to bills of exchange, and it was therefore necessary for payment to have been demanded from the defendant, as in ordinary cases. He had no claim without having previously demanded payment; and as it was not proved that such demand was duly made, I am of opinion that he cannot now be let in to sue for his original debt." *Soward* v. *Palmer*, 2 Moore, 274.

Conditional release inoperative until performance of condition.

The composition is sometimes made to depend conditionally on other circumstances than those of the punctual payment of the dividend: As, where the creditors of a man executed a deed-poll, whereby, after reciting that the debtor had assigned over, by an indenture of even date, all his estate and effects to trustees in trust for the creditors, they (the creditors) covenanted with the debtor to accept their share and dividend of the estate, and that they would not at any time thereafter sue the debtor, or his goods or chattels for any debt or other thing then due or owing to them, *provided the estate and effects of the said debtor should be fairly accounted for by the trustees, and a dividend made amongst them;* the plaintiffs having by their replication averred that the trustees had not fairly accounted, a demurrer to this replication was overruled. *Kesterton* v. *Sabery*, 2 Chit. Rep. 541.

Again, where, at a meeting of creditors, they subscribed a resolution that, in consideration of the debtor undertaking to assign the whole of her stock in trade, book debts, &c. to a trustee for the benefit of the creditors, they agreed to accept the same in full of all demands, and to execute releases to her as soon as the property should realize the sum of 238*l.* The creditors sold the stock for 223*l.*, and took a security for the purchase-money. The present action having been brought by a creditor for his original demand, it was contended for the defendant, that the agreement operated to suspend the right of action, and that at all events no more than the difference between 223*l.* and 238*l.* could be recovered. But Lord *Ellenborough* was of opinion, that although, if it could have been shewn that the whole of the stock had been taken by the creditors in satisfaction of their debts, it would have been an answer to

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the action as an accord and satisfaction; yet, that it was impossible, under the circumstances, to consider the creditors as having agreed to take less than 238*l.* in satisfaction of their debts. And the plaintiff had a verdict for the full amount. *Wigglesworth* v. *White*, 1 Stark. 218.

Effect, where parties cannot be restored to their former situation.

If circumstances render it impossible to reinstate the parties in their former situation, this may be a ground for not remitting the creditors to their original remedies. Thus, where the terms of a compromise originally agreed to underwent some alteration, pursuant to a resolution passed at a meeting of the creditors, it was held, that this alteration did not revive the right of action of a creditor who was present at the first, but not at the second meeting, it being impossible that the parties could be restored to their original situation. It was, Lord *Ellenborough* observed, an anomalous case. *Cork* v. *Saunders*, 1 Barn. & Ald. 46.

Tender of thing agreed to be accepted in satisfaction.

Actual tender of that which is agreed to be accepted in satisfaction of the debt compounded for, must be proved by the party setting up the composition. And therefore, where, at a meeting of creditors a resolution was entered into to accept 8*s.* in the pound, to be secured by promissory notes of the debtor guaranteed by a third person, and that the debtor should assign to the creditors certain debts, upon which the creditors should execute a general release; it was proved that the assignment was executed by the debtor, and by all the creditors except the plaintiff, who might have received his promissory notes if he had applied for them, but they had not been tendered: It was held, that this was not a valid defence to the action. Lord *Ellenborough* observed—"The rule is, that the person to be discharged is bound to do the act which is to discharge him, and not the other party. If the defendant had offered the notes at the time of action brought, it might have been a ground for staying the proceedings." Mr. Justice *Dampier* said—"It is laid down by Littleton, sect. 340, that the obligor of a bond conditioned for the payment of money at a particular day is bound to seek the obligee, if he be in England, and at the set day to tender him the money, otherwise he shall forfeit the bond. So, in this case, the defendant was to give the notes, and therefore to go with them to the plaintiff, and he was not to go to the defendant. Suppose the condition had been to pay a sum of money, I apprehend the defendant must have sought out the party in order to pay it." *Cranley* v. *Hillary*, 2 Mau. & Selw. 120. But, in a previous case at *Nisi Prius*, Lord *Ellenborough* had ruled, that, where the creditors of a man agreed to grant him time for the payment of his debts, and to take his notes payable in London for the amount, the remedy was suspended by the agreement, there being no evidence that the defendant had *refused* to give the notes according to the agreement. *Boothby* v. *Sowden*, 3 Camp. 175. Upon this case being cited to the Court in *Cranley* v. *Hillary*, Lord *Ellenborough* said—"If any thing incorrect is there laid down, that is no reason why we should adhere to it now. Perhaps, however, what is there laid down may be right as it applied to the facts of that case."

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If debtor is to assign his property on request, tender requisite.

If the preliminary act to be performed by the debtor is to be done on *request*, such request must be proved in order to sustain an action for the original debt. Thus, where the agreement between two partners and their creditors was, that the debtors should execute a conveyance and assignment of their estate and effects to certain trustees, who were from time to time to divide the monies when received among the creditors by certain instalments, until the whole were satisfied; and the debtors agreed to make the conveyance and assignment whenever thereunto required, in which deed were to be inserted all other usual and necessary clauses and conditions. The trustees converted some of the effects, and paid the creditors 10*s.* in the pound. They then called on the debtors to execute a deed of conveyance of their estate, which being tendered to one of them at a meeting of the creditors, he refused to execute it, on the ground that it did not contain a general clause of release. The meeting was then adjourned, in order to ascertain whether the other debtor who was in the country would execute, and in the meantime the present action was brought. The plaintiff was nonsuited by the direction of the Judge, who thought that it was reasonable for the debtor to require a clause of release; and the Court of Common Pleas refused to set aside the nonsuit, being of opinion that the action was premature, inasmuch as the conveyance had been tendered to one only of the debtors; and that the refusal of one to execute the deed under such circumstances, did not remit the creditors to their original rights. *Tatlock* v. *Smith*, 3 Moore & Payne, 676.

Equity will restrain the enforcement of revived legal demand, where.

Even if the legal demand be revived by the debtor's default, a Court of equity will interfere to prevent a creditor from enforcing such demand inequitably, and to the prejudice of the other creditors with whom he has coalesced in the composition. Thus, where A. & Co., who were indebted to B. in a sum of money, part of which was secured by their covenant and bonds, called a meeting of their creditors, who came to a general resolution to accept a composition of 10*s.* in the pound, to be paid by certain instalments, to be secured by five promissory notes of A. and one of the other partners, the last of which was to be indorsed by some third person, to be approved by the creditors: B. concurred in and promoted that arrangement, and received the four notes, but not the fifth. The first note was not paid when due; upon which B. offered to deliver up the bonds, and accept the fifth note without security, if A. would pay the note then due; but not obtaining payment, he brought an action on the bonds. A. afterwards paid the note, with interest, and tendered the fifth note without security to A.'s solicitor, which was refused. He afterwards proposed a personal security for the fifth note to him. B. intimated his determination not to acquiesce in the composition, on the ground that the second note, which in the mean time had become due, remained unpaid. A. then filed the present bill for an injunction to restrain the actions brought by B., and to obtain the delivery up of the

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covenant and bonds. Lord *Eldon*—"My decision upon this motion will not in any degree break in upon the principle, that a creditor, *having entered into an agreement for a composition, is not bound to take less than his debt, unless that agreement shall be absolutely and strictly fulfilled.* This case is constituted of circumstances requiring much attention, beyond what would be due to that simple case. The question is to be considered with reference, not only to the individuals who are parties to the agreement, but to the other creditors also; whether, attending to the actual nature and faith of the transaction, it is competent to this creditor to resort to his original debt; giving the other creditors reason to complain of a breach of the condition under which they had agreed to accept a composition, if this creditor should retain a demand for his whole debt. If there is any principle for relieving against immediate payment, it arises out of the interest of the other creditors. The justice due to them requires the interposition of a Court of equity to relieve against an action, which, except upon equitable principles, could not be resisted, supposing, which is not clear, if such a use of the bonds would be considered fraudulent, that the defendant would not have a sufficient plea at law. It is said, the action ought to be brought against the other partners also; but then, the bonds being joint and several, a separate execution might have been taken out; and, if the parties have dealt so that one could recover at law, a Court of equity has only to take care that no use shall be made of that power at law to the prejudice of other creditors. Upon that principle the conclusion is, that this creditor cannot compel payment of more than would have been due upon the notes. Execution must be restrained accordingly to the instalments due upon the notes, and the fifth note must be delivered to the defendant." *Mackenzie* v. *Mackenzie*, 16 Ves. 372.

Effect where bankruptcy intervenes before all the instalments are paid.

If creditors, upon accepting a composition to be paid by the debtor by certain instalments, absolutely release him from the residue of the debts, they are precluded, in the event of his becoming bankrupt in the interim, from proving under the commission for more than the new debt arising out of the composition agreement. *Ex parte Goodair*, 1 Mont. Bankrupt Law, 222. But *contrà* where the creditors merely engage, that, upon payment of the sum agreed to be accepted, they will release the debtor; for then, if the debtor becomes bankrupt, the compounding creditors are entitled to prove the whole debt *minus* only the sum, if any, which they have received under the composition agreement, and which they are allowed to retain as part payment of the original debt. *Ex parte Vere*, 1 Rose, 281. In this case, there was an express provision, that, if the debtor became bankrupt before the composition was paid, the creditors should be allowed to prove the whole amount of their debts; but Lord *Eldon* disclaimed founding his decision upon this clause, observing, that, if there had not been a word about bankruptcy, as the creditors had never stipulated to give any release till the payment of these notes, until

they had been paid, the deed never could have been available as a plea in bar at law.

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Though it is laid down in some of the early authorities, that a release cannot be made defeasible by matter subsequent, 5 Bac. Ab. 6th ed. 712, citing Lutw. 638; yet the contrary was treated as clear by Lord *Eldon* in a recent case, in which, however, his Lordship decided that no breach having occurred previously to the issuing of a commission of bankrupt against the debtor, such a proviso did not entitle the creditors to prove for the full amount of their debts, though some of the instalments remained unpaid. *Ex parte Peele*, 1 Rose, 255. If the agreement be, that the creditors shall look to a certain fund for satisfaction, and, if the debts be not satisfied thereout by a given period, that the debtor shall pay the residue, and bankruptcy occurs before the time, the creditors will be allowed to prove for the deficiency, allowing a rebate for the acceleration of payment. *Ex parte Richardson*, 14 Ves. 184.

2. *Effect of Clauses vacating the Instrument, in case all the Creditors do not concur by a certain Time.*

As to clauses vacating deed in case all do not concur.

In the construction of clauses of this nature, regard is had to the spirit and design of the instrument. Thus, if the proviso require that the deed shall be executed by the *trustees*, (to whom the property is expressed to be conveyed), this will be considered as importing, not that each individual trustee shall execute, but that some one trustee shall testify his acceptance, in order that the conveyance may not fail of effect by the disclaimer of the whole body. *Small* v. *Marwood*, 9 Barn. & Cress. 300. So, a requisition that the deed shall be executed by all the creditors whose debts are of a certain amount, by a given time, will be understood, notwithstanding the generality of the terms, to apply to creditors only who are to come in under the composition, and not to those who, having a real security, were by the provisions of the deed to be paid in full, and whose concurrence, therefore, it could not be intended should be essential to its validity. *Wells* v. *Greenhill*, 5 Barn. & Ald. 869.

Deed held to be void because all the creditors did not concur.

Such clauses, however, with respect to creditors to whom they do apply, in general are allowed their full effect. Thus, if a creditor does not execute the deed, but receives from the debtor, without the knowledge of the other creditors, the full amount of his debt, this is a fraud upon the rest, whose claims will, by virtue of the clause in question, remain in full force against the debtor. Thus, where a composition deed provided that W., a third person, should assign to the debtor his share in a certain partnership concern, and that the partnership deeds should be delivered up as a security, until 1000*l.* was obtained from the partnership estate, which, on being received, was to be divided equally amongst all the creditors. The deed also contained a proviso, that, if the insolvent and W. did not provide that sum, or in case all the creditors did not, within three months from the date of the indenture, accede to the arrangement therein proposed,

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and execute the deed, it was to be null and void, and the above sum of 1000*l.* paid back to the credit of W.'s estate. It appeared that a creditor, who claimed a debt of from 50*l.* to 60*l.* from the defendant, had received the sum of 40*l.*, in full payment of such demand, after this arrangement had been entered into, and to which he refused to accede, or execute the deed, and that such sum was received by him without the knowledge of the other creditors. Under these circumstances, a creditor who had executed the deed brought an action for his original debt; and the Court was of opinion that the deed was void, and therefore the action might be maintained; Lord *Gifford* observing, that, as one of the creditors accepted a sum in full satisfaction of his demand, without coming in under the deed, or acceding to the terms therein proposed, and without the knowledge or assent of the general creditors, it was so far a fraud as to vitiate the instrument altogether; and his Lordship said, he very much doubted whether, under the circumstances, the defendant would be entitled to any relief in equity. *Spooner* v. *Whiston*, 8 J. B. Moore, 580.

Where deed is to be void on "refusal" to concur, mere neglect not sufficient.

Where the vacating proviso is to take effect on the "refusal" of creditors to execute, actual refusal must be proved; mere neglect or failure to execute is not sufficient. Thus, where a debtor assigned to trustees all his leasehold and personal property, in trust for the benefit of creditors, and the deed was declared to be void, "if all and every the creditors whose debts respectively amounted to more than 5*l.*, should *refuse* to execute or otherwise consent to the deed, within six months from the date thereof." The lessor of a farm, of which the debtor was lessee, brought an action against the trustees, as assignees of the lease, for rent accruing subsequently to the assignment; and the defence was, that the deed not having been executed by all the creditors, became void under the proviso, and therefore the legal interest was not in the defendants: but the Court held, that no evidence of refusal having been adduced, the legal interest was in the defendants; and that it was not sufficient to prove that the deed had not been executed by all the creditors. *Holmes* v. *Love*, 5 Dowl. & Ryl. 56; *S. C.* 3 Barn. & Cress. 242. Where the defendant pleads a composition deed which is to operate conditionally in case all the creditors join, the *onus probandi* lies upon him, and not upon the plaintiff, who, by his replication, avers that all the creditors did not join. *Catherwood* v. *Chabaud*, 1 Barn. & Cress. 150; 2 Dowl. & Ryl. 271.

Remarks upon *Catherwood* v. *Chabaud.*

This decision seems hardly reconcileable with the axiom of evidence, that a party is not to be called on to prove a negative; for the averment which it requires the defendant to prove, namely, that all the creditors executed, involves the negative allegation, that there were no other creditors than those who did execute. But how is this to be proved? It is a fact that lies within the knowledge of the debtor himself, who is the defendant in the action, and of him only; for, though third persons may prove who are the creditors of a man, it is impossible that they can prove that he has no others; while, on the other hand, the assertion that all the

creditors did *not* execute, is positive, and may be easily proved from the mouth of any non-executing creditor himself.

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Though the deed contains no vacating clause, yet, if the debtor, in order to induce the concurrence of any creditor, represents, that all the other creditors have joined in the composition, and the fact turns out to be otherwise, this misrepresentation will vitiate the deed. Thus, where A. entered into an agreement with his creditors, by deed, in which, after reciting that he had proposed to pay to them 5*s.* in the pound in discharge of their debts; and that, in case he could not make such payment on or before Christmas-day then next, he would pay into the hands of L. ten guineas quarterly from that time until he should have paid the whole 5*s.* in the pound, the respective parties covenanted to fulfil the agreement. A. not having paid the instalment of 5*s.* in the pound by Christmas, one of the creditors, who had previously obtained judgment against him, sued out execution. A rule was now moved for, on the part of A., to shew cause why the Sheriff should not pay to him the amount levied under the execution, on an affidavit, stating, that, though he had not paid the 5*s.* in the pound at the time agreed upon, he had made the quarterly payment of ten guineas on the 22nd of March following. It was proved, on the part of the plaintiff, that A. had imposed upon him, by representing, that, if he would compound, all the creditors would concur, whereas it had been discovered that two had refused; and Lord *Kenyon*, C. J., was of opinion that this misrepresentation vitiated the agreement. "It was," his Lordship said, "the plaintiff's intention to make the defendant a free man by the composition; that was his inducement to agree to accept a part instead of the whole of his debt; but his purpose is not answered if other demands still remain unsatisfied." *Cooling* v. *Noyes*, 6 Durn. & East, 263.

Deed void for misrepresentation, without vacating clause.

So, without any vacating clause, the instrument may be executed, or rather sealed and delivered, in such manner as to make its operation with respect to those who have so sealed and delivered it, depend upon its being executed by the remaining parties, the delivery being considered as in the nature of an escrow. And therefore, where at a meeting of creditors, convened for the purpose of executing a composition deed, a conversation having arisen in regard to the possibility of all the creditors not executing, it was stated that the deed should be void unless all the creditors executed; it was then signed, sealed, and delivered in the usual manner by the defendant, (who was a party, as the surety-covenantor for the payment of the dividends), and placed in the custody of one of the creditors in order that he might get it executed by the other parties: The delivery by the surety was held to be merely as an escrow, though the condition was not introduced into the act of delivery, and therefore, the condition not being complied with, as the deed was not executed by all the creditors, an action could not be maintained

Execution by *some* parties held to be conditional, depending upon the concurrence of the rest.

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against the defendant on his covenant. *Johnson* v. *Baker*, 4 Barn. & Ald. 440; see also, *Hudson* v. *Revett*, 5 Bing. 368; *ante*, Vol. 2, p. 653 *c*, 2nd edit.; *Murray* v. Earl of *Stair*, 2 Barn. & Cress. 82; 3 D. & R. 278; *ante*, Vol. 2, p. 656 *b*, 2nd edit.; *Degoze* v. *Rowe*, Moore, 300, pl. 448; *Matson* v *Booth*, 5 M. & S. 223; *ante*, p. 212. But, in a subsequent case, where it was contended that a surety was not discharged by an agreement entered into by the creditor with the principal debtor to accept a composition, because the instrument was signed on the understanding that it was to be void, unless all the creditors concurred, and all did not concur; it was held that the parol declaration to this effect was inadmissible, as it went to contradict the instrument itself, which contained no such declaration. *Lewis* v. *Jones*, 4 Barn. & Cress. 506; 6 D. & R. 576.

Deed may be good in equity, notwithstanding that all do not concur.

But even though the deed contain a vacating clause of the nature of those under consideration, and though it be not complied with, by the concurrent execution of all the creditors within the prescribed period, yet, if the non-executing creditors bind themselves by their acts and conduct, even after the lapse of such period, to adopt the instrument, it will be valid in equity. Thus, where, by indenture, dated 18th of May, 1814, A. assigned a leasehold estate and his other effects to trustees, for the benefit of creditors, with a proviso, that, in case all whose debts amounted to 50*l.* or upwards, (except only such creditors who had charges upon the leasehold estate), should not execute the indenture, or accede to the terms thereof, on or before the 18th of April then next ensuing, then the assignment should be void; A. delivered to the trustees a list of creditors, containing, as he alleged, the names of all whose debts exceeded 50*l.* These persons all signed the deed before the 18th of April. On the 21st of June, 1814, A. died, having left a will, appointing the defendant executrix; and it was then discovered that he was indebted in a large amount to persons whose names were not included in the list, but who, on being applied to, executed the deed. The trustees now filed a bill against the defendant, praying that the estate might be applied according to the deed, and the defendant restrained from interfering in the testator's affairs. The defendant put in a plea, stating that two creditors, whose respective debts exceeded 50*l.*, did not execute the deed or accede to the terms thereof, on or before the 18th of April. Lord *Eldon*—"I take it to be quite clear, that, if creditors are to execute a deed of assignment by a time stated therein, and it is provided by the deed, that in case they do not do so, the deed shall be null and void, in case they do not execute the deed within that time, the deed is void at law. This deed, therefore, was void at law for that reason. But it is the constant course in equity, that if creditors act under such a deed, and thereby treat it as valid, although they have not executed it, that a Court of equity will also act under it, and treat it as valid, whether such creditors have signed it or not. The bill in this case stating expressly, that such creditors as were not included in the list, having been requested to

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become parties to the deed, they have in consequence of such applications executed the same accordingly, the plea does not extend to that fact, and I think it therefore bad: it relies on the non-execution merely, not at all touching the true question in the cause." *Spottiswoode* v. *Stockdale*, Geo. Coop. 102.

Deed held to be binding at law, notwithstanding vacating clause.

And even at law, for some purposes at least, it should seem, a creditor, after accepting a composition under a deed, will be considered to have concurred within the meaning of these vacating clauses, although he has not actually executed, and the clause does not in terms provide for any other species of concurrence, or evidence of assent.

Thus, in *Jolly* v. *Wallis*, 3 Esp. 228, where an action was brought by the assignees of a bankrupt, who had, several years before his bankruptcy, compounded with his creditors, to recover from the trustee under the composition deed a sum of money then in his hands for the purpose of being distributed among the creditors, and the ground of the action was, that the agreement for the composition contained a clause making it void if all the creditors whose debts amounted to 5*l.* did not sign by a certain day, and that all such creditors did not sign. But, as it appeared that the creditors in question had accepted the notes given in pursuance of the agreement for the payment of the instalments on their debts, Lord *Kenyon* held that the action could not be maintained, because, though the creditors had not actually signed the agreement, they had accepted the composition, and were therefore bound.

So, in the case of *Spooner* v. *Whiston*, 8 J. B. Moore, 580, Lord *Gifford*, C. J., expressed an opinion, that a creditor who had accepted a dividend under, though he had not executed, a composition deed, would be estopped from disputing its validity. The case, however, did not raise the point. Vide *ante*, p. 432.

3. *As to Agreements between particular Creditors and the compounding Debtor, at variance with the general Arrangement.*

What agreements with particular creditors are void.

If one creditor induce another to accept a composition, by himself undertaking to discharge the debtor from his demand, he cannot afterwards enforce such demand against the debtor, as this is a fraud upon the creditor to whom the undertaking has been made. *Wood* v. *Roberts*, 2 Stark. 417.

Creditor presumed to have compounded for his *whole* debt;

Upon this principle, it is well established that a creditor who has joined in a composition deed is not at liberty to allege that he executed it for part only of his debt, reserving his claim against the debtor for the *residue*, as the creditors at large are entitled to presume (unless the contrary be expressed) that all who concur in the deed compound for their *whole* demands. Thus, where a creditor executed a composition deed, and, upon being asked to put the amount of his debt opposite to his name, refused to do so, saying that he expected a note which had been

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given for part of it to be paid, alluding to a note which he had received from the debtor, and had indorsed to his own bankers. The present action was brought on the note in question, and it was held that the plaintiff was not entitled to recover, "for, that the deed, being executed in blank, was executed for the amount of the plaintiff's debt, whatever that debt might be." *Harrhy* v. *Wall*, 1 Barn. & Ald. 103.

Creditor executing a composition deed for a specified amount of debt, precluded from making any further demand.

And even where the creditor executes the deed for a specified amount of debt, setting such amount, in the usual manner, opposite to his name, he has precluded himself from claiming any further sum from the debtor. Thus, where a creditor, having two demands against his debtor, one of 185*l.*, as the acceptor of certain bills not then due, and the other of 81*l.*, for goods sold, signed the composition deed as a creditor for 81*l.* only, and now sued upon the bills, alleging that he was only barred by the composition deed to the extent of the debt he had claimed under it, Lord *Kenyon* said, that, though the bills were not due at the time when the deed was signed, there was a subsisting debt then due to the plaintiff by the defendant, as the acceptor of these bills of exchange; and, though they had some time to run, they might nevertheless have been claimed against the defendant's estate, in the same manner as bills of exchange are proveable under a commission of bankrupt, by stat. 7 Geo. 1, c. 31, by allowing a rebate of interest; that it was not to be allowed that a party, having several demands against an insolvent person, should split those demands, and come in under the composition deed for part, and sue for the remainder at a subsequent time; that such would be a fraud upon the other creditors, and defeat the very object of the composition, which was intended by the creditors to discharge the insolvent from all his debts, as well as be an oppression of the debtor, who had given up all his property to constitute a fund for their benefit. His Lordship, therefore, said, that he was clearly of opinion, that, as the bills upon which the present action was brought had been in the plaintiff's possession when he executed the deed of composition, if he meant to have claimed them against the defendant, he should have made them part of his demand against his estate as assigned; and that, not having done so, and having executed the deed, he was thereby completely barred as to any right of suing on the bills. On a motion afterwards made before the Court, the other Judges concurred in the opinion of the Lord Chief Justice. *Holmer* v. *Viner*, 1 Esp. 131. So, in another case, a creditor, being the holder of two bills drawn by the compounding debtor, the one accepted by A., and the other by B., was informed by the debtor, when the latter applied to him to join in the composition, that A. would pay his acceptance in full, and therefore, that it would be unnecessary for him (the debtor) to pay him a composition on that bill; and upon this representation the creditor executed the deed for the amount of the other bill only, placing such amount opposite his name. The deed so executed recited that the debtor was in-

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debted to his creditors in the sums set opposite their respective names, and that the creditors had agreed to accept a composition of 10*s.* in the pound on the amount of their respective debts, to be paid by certain instalments. The deed then contained a general release by the creditors from all demands except the securities for the composition. An action was now brought by the creditor for the amount of the bill omitted out of the composition deed, the plaintiff relying on the doctrine, that the general words of release may be restrained by the recital*; but the Court decided that the action could not be maintained, as the concealment of part of the debt was a fraud upon the rest of the creditors. Lord Chief Justice *Best* stated the principle to be, that, where several creditors meet, and agree to sign a composition deed, they must be all supposed to stand in the same situation, and one ought not to conceal any circumstance from the others, so that he may gain an advantage by such concealment; and if he does, it operates as a fraud upon them. Here, the plaintiffs agreed to take 10*s.* in the pound from the defendant. The other creditors might thereby be induced to believe that it was as much as his estate could pay, and that it was therefore useless for them to stand out for their demand in full, or require 20*s.* in the pound, when the plaintiffs said, that they were willing to accept 10*s.*; and, if they were led to suppose that the plaintiffs signed for the whole of their demand, when, in point of fact, they did not sign for one third, it was impossible for the other creditors to form a fair or correct judgment on the subject. *Britten* v. *Hughes*, 3 Moore & P. 77. (Compare this and the preceding case with *Payler* v. *Homersham*, 4 M. & S. 423, *ante*, p. 418).

Agreement to pay dividend on concealed debt, void.

If the agreement with the individual creditor goes no further than to entitle him to a dividend on the concealed portion of his debt, this is equally untenable against the other creditors; for, though it confers on him no advantage beyond what he would have had if the transaction had been open, yet the secrecy of it invalidates his claim even to this. *Eastabrook* v. *Scott*, 3 Ves. 456. In this case, the creditor had not only, at the request of the debtor, stated his debt below its real amount, and secretly taken a security for the dividend on the rest, but also had taken a security for the deficiency on the whole; and Lord *Alvanley* distinguished between the security for the deficiency and the securities for the dividend on the secret portion of the debt, directing the former to be delivered up, but merely restraining the creditor from suing at law upon the latter, his opinion being, that, though the latter was clearly void against the creditors, it might be available against the debtor himself, after satisfaction of the claims of the other creditors. But this point was reserved; and certainly the principle of subsequent cases affords strong ground to believe that the vice of the transaction would now be held to prevent the

* On this point, *vide ante*, p. 417.

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creditor from recovering the dividend on the concealed part of his debt, even from the debtor himself; for, the principle seems to go this length, that a person professing to join in a composition deed is a continuing creditor of the compounding debtor so far only as that deed makes or treats him to be such; every other demand against the debtor is wholly and absolutely extinguished.

Private agreement for extra advantage, void.

Hence, it is clear, that, if a body of creditors join in accepting a composition, and an individual creditor, professing to accede to that arrangement, surreptitiously makes an agreement with the debtor, for securing to himself some exclusive advantage, this is a fraud upon the other creditors, who act upon the faith that all are to be placed on an equal footing.

Agreement void at law as well as in equity.

This was the established rule of equity long before it had obtained admission into Courts of law. *Middleton* v. *Onslow*, 1 P. W. 763; Lord *Chesterfield* v. *Janssen*, 2 Ves. sen. 156; *Spurret* v. *Spiller*, 1 Atk. 105. But since the time of Lord *Kenyon*, it has been the acknowledged doctrine of the latter also; so that, if an action is brought upon a promise or security of this description, the circumstances, when given in evidence, constitute a valid defence. Thus, where in an action of *assumpsit* on a promissory note, it was proved by the defendants, that they, being considerably indebted to the plaintiffs, and to several other creditors, and being insolvent, assigned over all their effects in trust to pay 11*s.* in the pound to their creditors, which all the creditors had accepted except the plaintiffs, who, as their demand had recently accrued, refused to sign the deed unless the defendants would give them a note for the remaining 9*s.* in the pound. This note (which was the subject of the present action) was given, and the defendants subsequently promised to pay it. The Court of *King's Bench* held, that the action could not be maintained. Lord *Kenyon* said—"I wish to disclaim founding my opinion upon grounds of equity as contradistinguished from grounds of law. The foundation of my opinion is, that the temptation to give this note was a fraud on the creditors who were parties to the contract, on which their debts were to be cancelled in consideration of receiving a compensation. The note preceded the execution of the deed. All the creditors being assembled for the purpose of arranging the defendant's affairs, they all undertook and mutually contracted with each other, that the defendants should be discharged from their debts after the execution of the deed. Then these plaintiffs, in fraud of that engagement, entered into a contract with the defendants, which prevented their being put in that situation which was the inducement to the other creditors to sign the deed, and to relinquish a part of their demands. If a bankrupt, or an insolvent, after becoming free from his engagements, having no restraint on his mind, voluntarily give security for a former demand, which is only due in conscience, such a security may be enforced in a Court of law. But the contract, in the present case, affected all the other creditors, by rendering abortive all that they had intended to do for the bankrupt, in compounding for their

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debts. It has been said, that the Court of Chancery has interfered in these cases on equitable principles, and that some of the cases are one way and some another. But I do not know that Lord *Hardwicke* (in Lord *Chesterfield* v. *Janssen*) would have been of a different opinion in a Court of law. And during the time that I was in a Court of equity, the decisions on this subject were uniform; and in this sort of cases, the Court ordered the securities to be delivered up. Then, as to the revival of this debt by a subsequent promise, contracts not founded on immoral considerations may be revived, though before there was no legal remedy. But this transaction is bottomed in fraud, which is a species of immorality, and, not being available as such, cannot be revived by a subsequent promise." *Cockshott* v. *Bennett*, 2 Durn. & East, 763. See also *Jackson* v. *Lomas*, 4 Durn. & East, 166.

The principle was again recognised in the case of *Jackson* v. *Ducane*, 3 Durn. & East, 551, where A., for the advancement and benefit of B., having contracted with C. to purchase certain goods at a given price, it was held, that an agreement between B. and C., behind the back of A., for the payment of an additional price, was void as a fraud upon A.

Immaterial that the contract is for further security only, which is to be given by a third person, and not the debtor himself.

Though the secret bargain is for additional security only, and not for an accessional amount of dividend, and though it is made with, and the security is to be given by a third person, and not the debtor himself, it is equally obnoxious to the principle in question, and is void both at law and in equity. Thus, where A. and B. assigned their effects to trustees, for the payment of their creditors by certain instalments, which were to be secured by their promissory notes, indorsed by some third persons as sureties, except the two last, which were to be secured by the notes of A. and B. alone. The plaintiff's firm, being creditors, refused to sign the deed, on the ground that they had a collateral security from other persons, upon which C., a third person, agreed with them within six weeks to procure security to the satisfaction of the plaintiffs for the two last instalments; in consideration of which the plaintiffs signed the deed, and afterwards brought an action against C. upon the agreement, but which it was held could not be sustained. Lord *Ellenborough* said—"Though this be not like some of the cases mentioned, where security was obtained by the particular creditors for more than the others were to receive, yet the principle of all of them is the same, that, where the creditors in general have bargained for an equality of benefit, and mutuality of security, it shall not be competent for one of them to secure any partial benefit or security to himself. *Leicester* v. *Rose*, 4 East, 372. This case over-rules *Feise* v. *Randall*, 6 Durn. & East, 146.

Jurisdiction of equity not excluded by the adoption of the vacating rule at law.

And here it may be observed, that the adoption by Courts of law of the principle which vacates contracts of this kind, does not take away, though it certainly diminishes the necessity for resorting to, the jurisdiction of Courts of equity, to order instruments given under such circumstances to be delivered up. Thus, where A., the plaintiff's father, having proposed

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to his creditors a composition, B., the defendant, one of those creditors, refused to come in, whereupon C., the plaintiff, gave him his bond for the deficiency, and B. gave up the father's bond, at the same time executing a power of attorney authorizing C. and another to compound his (the father's) debt. It appeared that none of the creditors knew of the circumstances which induced B. to concur. C. filed a bill against B. to compel him to deliver up the bond, and Lord *Eldon* decreed accordingly. "It is admitted at the bar," said his Lordship, "that, if this bond was given to secure to one creditor the deficiency of a composition, and was given without communication of that fact to the other creditors, it is bad in equity; and certainly it is now well understood that it is bad at law also. But I remember when such a bond was not considered bad at law by any person attending this Hall. It must however now be taken to be bad at law: declarations of Courts of law upon that point having been very uniform of late. But it is also well settled, that the jurisdiction of Courts of equity is not gone by the resolution of Courts of law to adopt the principle of equity. It is contended for B., that this distinction must be made in his favour; that he has been, by the act of the plaintiff C., placed in circumstances that make it unfit to give him this equitable relief, unless he is replaced in the situation in which he stood before the vitious transaction took place; that C. the younger is bound in conscience to replace the bond of A., which was given up by B., in his hands, before any relief can be given against the other bond. The circumstances attending that bond from A. to B. are very suspicious; and the proof fails in fixing E. with the duty of restoring that bond." *Jackman* v. *Mitchell*, 13 Ves. 581.

Immaterial whether the composition reduces, or merely postpones debts.

It is of course immaterial, in regard to the principle under consideration, whether the composition reduces or merely postpones the creditors' demands. Thus, where the creditors of a man agreed to accept payment of their debts by twelve instalments, and his wife and a third person joined in conveyances to secure these instalments, one of the creditors was prevailed on by the debtor to accept a bond for part of his debt, and to represent that as his whole demand in order to induce other creditors to compound: Mr. Baron *Hotham* granted an injunction to restrain proceedings at law for the recovery of the residue, observing—"This indeed is a composition, not to take less than the whole debt, but only to receive the whole sum in a different manner, and at different times; yet it is a composition by which the creditors agree to take the effect of their respective demands in a less beneficial manner than they were before entitled to; and to sign a false schedule in order to induce them to come into that measure, is to deceive and defraud them." *Cecil* v. *Plaistow*, 1 Anstruth. 202.

Absence of clause vacating deed in case all do not concur.

And the circumstance that the deed does not contain the usual clause vacating it in the event of the creditors not concurring by a certain day, does not take the case out of the rule. Thus, where A., being insolvent,

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proposed to his creditors to take a dividend of 15*s.* in the pound, one refused unless he would give a promissory note for the remainder, which he did, making it payable two years after date. It did not appear that all the creditors had come into this agreement, or that there was any proviso making it void if all the creditors did not come in by any certain time. An application was now made for an injunction to restrain the creditor from suing upon this note, which Lord *Thurlow* granted without hesitation, being most clearly of opinion that it was within the principle of all the other cases. *Constantein* v. *Blache*, 1 Cox, 287.

Circumstance of creditor giving up a collateral security.

Nor is the transaction protected by the fact that, previously to the creditor joining in the composition deed and taking the new security, he held a collateral security from third persons, which he was induced to give up in consideration of the engagement in question. Thus, in the case of *Ex parte Sadler*, 15 Ves. 52, where H. and H. (partners) called a meeting of their creditors, when the latter agreed to accept a composition of 17*s.* in the pound, of which 7*s.* was to be secured by D., and the remaining 10*s.* by the promissory note of H. and H. The petitioners S. and J. (partners) signed a memorandum acceding to this composition, but, when the deed was tendered for execution, being requested to deliver up two acceptances, one of A. for 700*l.*, and another of B. for 200*l.*, they refused to do so, or to execute the deed, but afterwards were induced to comply, upon receiving the joint note of A. and B., and H. and H., for the amount of the last instalment of the composition. Six only of eleven creditors signed the composition deed. A. became bankrupt, and the present petition was filed by S. and J., claiming to prove this note against his estate. Lord *Eldon* dismissed the petition—"Upon principle," said his Lordship, "if two creditors inform a third, that, upon their view of the justice and humanity of the case, they are so seriously persuaded that the other ought to take the security of the debtor for 17*s.* in the pound, and to discharge him from the rest of the demand, and not only to take his own security, but not to oppress him by requiring any other person to come under an obligation for payment, can a clearer misrepresentation be stated, than that, at the same instant when they are desiring that creditor to take the security of the debtor himself alone, they are procuring the security of other persons for themselves? The principle being, that, in such a transaction all should deal upon equal terms, that creditor ought to be put in a situation that would enable him to require that those persons should become security for him also; at least, the creditors obtaining that security ought not to represent that they are not obtaining it: but, proposing to the other creditor to deal upon equal terms, they ought to impart to him all the benefit of that security. This is therefore in principle a direct contradiction of the good faith of the transaction. The legal effect also of this instrument, executed after those notes were given, is a release."

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Compounding creditor may retain collateral securities.

But, though the doctrine in question forbids a creditor who possesses collateral claims against third persons, from stipulating for an additional security for his composition on account of his surrender of those claims, yet it does not preclude a compounding creditor from *retaining* the benefit of any collateral securities antecedently in his possession. If, therefore, a creditor signs a composition deed for a debt of 1000*l.*, part of which (say 200*l.*) is secured by the acceptance of a third person, and the creditor afterwards receives the 200*l.* from the acceptor, the only effect of this is to strike so much out of his demand against the debtor, reducing the sum on which he is to receive the composition dividend to 800*l.* Of this no creditor has reason to complain, there being nothing in the nature of a composition arrangement to imply the relinquishment of collateral securites for the debt. *Thomas* v. *Courtnay*, 1 Barn. & Ald. 1. But, if the composition deed contained a clause expressly giving up securities to the debtor, (which is certainly an uncommon provision), the case of course would be otherwise. The creditor would then be liable to an action at the suit of the debtor for the recovery of bills, or the produce of bills retained by him. *Stock* v. *Mawson*, 1 Bos. & Pull. 286. The notice of these two cases has produced a digression from the subject immediately under consideration, to which it is now necessary to return.

Principle of the general rule.

The invalidating rule in question is founded upon a two-fold principle, comprehending not only the protection of the creditors from the unfair advantage attempted to be gained at their expense by the secretly contracting creditor, but also the protection of the debtor himself from the oppression of the latter, who would pervert to the accomplishment of his own selfish purposes the benevolent intention of the creditors at large, in procuring the complete exoneration of their debtor from his engagements, which object of course is frustrated if any portion of his former liabilities adhere to him. The circumstance, therefore, that no creditor has been actually defrauded, the agreement in question having been made with the last of the creditors who executed the composition deed, so that the concurrence of no other creditor could have been induced by his ostensible junction, does not sustain the transaction. *Knight* v. *Hunt*, 3 Moore & Payne, 18. Unless, in this instance, the deed contained a clause vacating it, if all the creditors did not concur (which is not stated to have been the case), the junction of the creditor in question would seem to have been without an object, as the debtor, having been discharged from all his other demands, was at liberty to make any arrangement with his only remaining creditor that he thought proper. It is observable, that, in the case of deeds containing such a clause, the Courts were placed in the alternative of being compelled either to hold the private agreement to be void, (as they have done), as producing an unfair inequality among the creditors, or that the deed itself was vacated by such inequality, the creditors to whom the extra advantage was stipulated to be

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given being regarded as non-compounding creditors within the meaning of the clause in question, since they covertly violate the principle, while ostensibly complying with the terms, of such clause. Indeed, an early case seemed to lend some countenance to this doctrine; *Child* v. *Danbridge*, 2 Vern. 71; but, in later times, it has been deemed more reasonable that the particular agreement should be invalid, than that it should have the effect of invalidating the entire arrangement.

Agreement void though composition is never carried into effect.

Where the composition in contemplation of which the security is given is never carried into effect, so that in fact there are no creditors who can be defrauded by it, still the transaction, being fraudulent in its inception, does not create a demand capable of being enforced either at law or in equity. Thus, where B., a creditor of A., engaged, that if C., a friend of A., would guarantee his debt, B. would procure the creditors of A. to accept a composition of 5*s.* in the pound for their debts, which transaction was to be kept a secret from the creditors. C. accordingly gave the promissory note upon which the present action was brought. B. endeavoured to induce the creditors to accept the composition, but failed. The Court held, that the action was not maintainable. *Dallas*, C. J., observed, that the agreement, being void in its creation on the ground of fraud, did not cease to be so on account of events which happened afterwards. *Wells* v. *Girling*, 4 J. B. Moore, 78. In a previous case, however, it had been held by the Court of Common Pleas, that the assignees of a bankrupt could not recover in trover certain notes and bills of exchange which had been privately delivered to the defendant for part of his debt, in consideration of his accepting a composition for the rest, the composition not having been carried into effect; though it was admitted that, if it had, the securities must have been void against him. There was in the deed of composition a clause expressly confirming to the creditors the securities they then held; but the Court does not seem to have proceeded on this, but on the general ground that it was a fraud on the composition arrangement, and not on the bankruptcy. *Wheelwright* v. *Jackson*, 5 Taunt. 109. In *Wells* v. *Girling*, several of the Judges considered this case as distinguishable from the case then under consideration, because it was an action to take the securities out of the hands of the creditor, and not an attempt on his part to enforce them. In *Ex parte Oakley*, 1 Rose, 138, a creditor was held not to be precluded from proving under a bankruptcy, by his having, in some negotiations with a creditor, with a view to arrangements which were never carried into effect, omitted his own in a list of the debtor's debts.

Agreement for extra benefit may be valid, if communicated to the creditors at large.

In the cases that have been stated, it is to be observed, that the vitiating quality in the transaction was its secrecy; for, if the agreement is made openly, and with the knowledge of the creditors, the ground for impeaching it fails; as in the instance mentioned by Lord *Eldon*, in *Jackman* v. *Mitchell*, 13 Ves. 586, of a person who had made a compo-

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sition with his creditors, and secured the deficiency to one bond creditor; and, as it was part of the arrangement that it should be, and it accordingly was communicated to the other creditors, Lord *Thurlow* allowed it to be good.

The best, and perhaps almost the only effectual means of giving due publicity to the agreement, is by a recital in the deed itself; for, any partial communication, however extensive, will be unavailing. As, where a creditor declared, at the time of affixing his signature, that he would not give up certain dividends arising from the estate of a third person, who was liable for the debt, and had become bankrupt, and he desired the solicitor to signify this his intention to every creditor to whom the deed was tendered for execution; notwithstanding which intimation, however, it appeared that some of the creditors, and the sureties for the instalments, were not informed—Lord *Eldon* said, that the sureties ought to have had notice; and even if such notice had been proved, there would have been great difficulties on the other point. *Ex parte Crowe*, (1810), Mont. Bank. Law, Append. 97.

Debtor may *subsequently* contract to pay the undischarged residue of any debt.

So, it is to be observed, that there is nothing in the doctrine in question to prevent a man who has compounded with his creditors from *subsequently* engaging with one of those creditors to pay him the residue of his debt; for the doctrine, when once it has effected the debtor's emancipation from his existing liabilities, has no further object: its whole scope and purpose are satisfied. The policy on which it is founded does not require that it should restrain or interfere with the debtor's power to bring any new obligation on himself by his own spontaneous act.

Thus, where the debtor entered into a composition with his creditors, by which they were to receive 6*s.* 8*d.* in the pound, in full of all demands; one of the creditors, named Mary Juler, had agreed to accept the composition, but objected to execute the deed of release, on the ground that it would prejudice a collateral security. Two years afterwards, the creditor took from the debtor a bond for the whole amount; and this bond was held to be valid. Lord Chief Justice *Best* observed—"If he (the debtor) chose voluntarily to give a bond, even at the pressing solicitation of Mary Juler, there is no principle, no authority, to protect him against a suit on a bond so given. The giving a bond under such circumstances is no fraud on the other creditors. If the defendant became rich, and Mary Juler poor, as might be the case in the course of two years, what is there in law or morality to prevent him from paying her what she had lost by him? or, if he had not the money immediately at hand, giving her a security to pay it at a more convenient time? A bond given under such circumstances is a voluntary bond, and binding on the obligor, upon the same principle that a bond given by a bankrupt, after he has fairly obtained his certificate, is binding on such bankrupt. As it was not given, or agreed to be given, at the time of the composition, it is no fraud on the other creditors. Mary Juler agreed to accept the composition upon the

same terms as the other creditors; she had then no reason to expect that she should be paid any more than her composition. It is the pretending to accept the same terms as the other creditors, and so encouraging them to come into the arrangement, when the party so pretending has at the time secured to himself some advantage of which the others are not to partake, that constitutes the fraud on the other creditors. There is no deceit of this sort in the present case." *Took* v. *Tuck*, 12 Moore, 435. A writ of error was brought in the Court of King's Bench, when that Court affirmed the decision of the Common Pleas, on the ground that the contract for security was subsequent to and unconnected with the agreement for a composition; and therefore, that the principle of the general cases did not apply. *Tuck* v. *Tooke*, 9 Barn. & Cress. 437; 4 M. & R. 393.

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4. *Effect of a Composition upon Remedies against Third Persons.*

It has been already shewn, that the concurrence in a composition deed does not imply a relinquishment to the debtor of collateral claims against third persons, (*vide ante*, p. 442); but it remains to be inquired how far it will invalidate or affect such claims themselves, the preservation of which, so far as is practicable, should be the especial object of the draftsman's care in preparing composition deeds. For this purpose, the release to the debtor ought to be in the form of a perpetual covenant not to sue, rather than of a release, properly and technically so called, which will operate to discharge co-debtors, in spite of any qualifying proviso expressive of a contrary intention, (*vide ante*, p. 416); while, on the other hand, a covenant not to sue, though equally efficient to discharge the covenantee-debtor, has no operation in prejudicing the claims of the creditor against co-debtors. (*Vide ante*, p. 417).

Effect of composition on remedies against third persons.

As to claims generally against third persons.

Numerous are the questions that arise respecting the effect of a composition made by the holder of a bill of exchange or promissory note, with any of the various parties to the bill or note in regard to claims against other of such parties. "The holder," it has been well observed by a high authority, "has the dominion of the bill at the time, he may make what arrangements he pleases with the acceptor, but he does that at his peril; *and if he thereby alter the situation of any other person on the bill, to the prejudice of that person, he cannot afterwads proceed against him.*" *Per* Lord *Ellenborough*, in *Gould* v. *Robson*, 8 East, 580. Thus, if the holder release or compound with, or give time to the maker of a promissory note, or the acceptor of a bill of exchange, without the concurrence of the indorsers, the latter are thereby discharged. *Ex parte Smith*, 3 B. C. C. 1*. *Tindal* v. *Brown*, 1 Durn. & East, 167; *English* v. *Darley*,

Compositions by holders of bills of exchange and promissory notes.

* In this case, the proof of a debt against the bankrupt estate of an indorser was expunged, because the holder, after having proved the amount of the notes and bills, compounded with the makers of the notes and ac-

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2 Bos. & Pull. 61; though the drawer may have had no effects in the hands of the acceptor. *Gould* v. *Robson*, 8 East, 576. So it is clear, that the giving time to the acceptor, much more the completely discharging him by composition, will release the drawer; *Ex parte Wilson*, 11 Ves. 410; though it should seem that this rule would not apply, if the acceptance had been given for the accommodation of the drawer, the acceptor having no effects in his hands belonging to the drawer at the time. It is clear, that the mere receiving from the acceptor or maker of part of the sum due on the note or bill, will not discharge the indorsers from the residue, unless the holder agrees to give time for the payment of such residue; and it is observable, that the taking of a new bill for the amount, will or will not amount to such an agreement, according to the fact whether the remedy under the old bill is suspended or not; (compare *Gould* v. *Robson*, 8 East, 576, with *Pring* v. *Clarkson*, 1 Barn. & Cress. 14; 2 Dowl. & Ryl. 78); though the effect of all such acts of course may be neutralized by assent. *Clark* v. *Devlin*, 3 Bos. & Pull. 363.

Principle of the doctrine in regard to bills and notes.

The doctrine, that the giving time to the acceptor or maker discharges all the intermediate parties, is founded on the broad and intelligible principle, that a man, though he may discharge his own debtor, is not at liberty to discharge the debtor of another. The acceptor of a bill of exchange, and the maker of a promissory note, is the ulterior debtor on the instrument, and is liable to be sued by *any* other party who may have acquired a right of action upon it. Hence it follows, that to release or give time to the acceptor or maker, extinguishes the holder's claim against all the indorsers, because it deprives them of the right they would otherwise possess of taking the bill or note out of the hands of the holder, by paying its amount, and claiming such amount from the acceptor or maker. If the Courts had decided that the holder might maintain an action against an indorser, after having released the acceptor or maker, they must either have allowed the indorser a remedy over against the acceptor or maker, which would in effect have subverted the holder's release, (a consequence which we shall presently see may ensue when the transaction is between a principal and surety and a releasing creditor), or, by refusing such remedy, have done palpable injustice to the indorser, by permitting the relative situation of himself and the indorsee to be deranged by the act of the holder, or, in other words, by permitting one man to discharge the debtor of another. By parity of reasoning, the release of, or giving time to an indorser, discharges *subsequent* indorsers, but has no effect in pre-

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ceptors of the bills, without the consent of the assignees. Lord *Thurlow's* judgment contains a full recognition and able exposition of the principle, that a release of any person liable to the payment of a bill of exchange or promissory note, exonerates all intermediate parties.

judicing the remedy against a *prior* indorser, or the acceptor or drawer; *Claridge* v. *Dalton*, 4 Mau. & Selw. 226; or the maker, if the instrument be a promissory note; *Carstairs* v. *Rolleston*, 5 Taunt. 551; because, as the prior indorser, acceptor, and drawer or maker, never could by possibility acquire any right of action against the released indorser, whose debtors they are, they cannot be prejudiced by the release or suspension of the remedy against the latter.

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In the preceding remarks it has been assumed, that the doctrine applicable to principal and surety does not come into operation to vary the relative rights of any of the parties to the bill; for it is to be observed, that, if any such party has lent his name for the accommodation of another without receiving value, such person stands in the relation of surety for the person for whose benefit he contracted the liability; and therefore all dealings with the latter by the bill holder, aware of this suretyship, should be accompanied by those guards and precautions which are requisite where the interest of a surety is concerned. Thus, though we have seen that, by the general rule, the release of the drawer does not discharge the acceptor, yet it is clear, that, if the holder of a bill accepted for the accommodation of the drawer, *knowing this fact*, compounds with the drawer without the consent of the acceptor, the latter is thereby absolutely discharged. *Ex parte Glendinning*, Buck, 517. This doctrine, with respect to sureties in general, is so well established, as to be one of the most familiar principles of law. It is in vain to allege, that the creditor has made an advantageous compromise with the principal debtor, and that the surety, acting for himself, could not have obtained better terms. The obvious and unanswerable reply (in the language of Lord *Eldon*, in *Ex parte Wilson*, 11 Ves. 412) is, that "those for whose benefit it is alleged to be made, are the proper judges whether it is for their benefit or not."

As to compositions by the holders of accommodation bills.

The case of *Ex parte Glendinning* decided a point, with respect to accommodation bills, which had been left in some doubt by the antecedent authorities; Lord *Ellenborough*, on the one hand, having, in two instances, *Laxton* v. *Peat*, 2 Camp. 185; *Collott* v. *Haigh*, 3 Camp. 281, ruled at *Nisi Prius*, that the giving time to the drawer of a bill, with the knowledge that it was accepted for his accommodation, discharged the acceptor, while, on the other hand, the Court of Common Pleas, in the case of *Fentum* v. *Pocock*, 5 Taunt. 192, following a *Nisi Prius* decision of one of the learned Judges then composing that Court, (Sir *Vicary Gibbs*), *Kerrison* v. *Cooke*, 3 Camp. 362, held, that the acceptor was not discharged under such circumstances, the Court being of opinion that the knowledge of its being an accommodation acceptance made no difference—an opinion to which Lord *Eldon* himself seems to have inclined in *Ex parte Wilson*, 11 Ves. 411; though his Lordship's decision in *Ex parte Glendinning*, shews that he had subsequently surrendered his objection,

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deferring (as this great Judge was ever wont to do) to the authority, even though he dissented from the principle of the cases. This reluctance of assent imparts additional weight to his Lordship's decision, which may be considered to have settled the point beyond controversy.

Suretyship immaterial, unless known to the creditor.

Suretyship, however, will not affect a creditor who has no notice of its existence. A bill holder, unless informed to the contrary, is warranted in presuming that the parties to the instrument stand to each other in the relation in which the bill represents them, namely, that the acceptor is the debtor of the drawer, and the drawer of the indorser, and so on, and therefore a release from the holder, however absolute in its terms, to an indorser, will not discharge any *prior* party, though the latter has received no value from the releasee. Thus, in the case of *Carstairs* v. *Rolleston*, 5 Taunt. 551, where, in an action by the holders of a promissory note against the makers, the defence was, that the plaintiffs had released the indorser, to whom the note had been given, without consideration, and that the release had destroyed the consideration as between the holders and indorser, and thereby reduced the plaintiffs to the same state as if they had originally received the note from the defendant without value; but the Court held, that the holders did not, by releasing the indorser, relinquish their claim against the makers, intimating that they gave no opinion what would be the case upon a note where the holders originally had notice that it was given without consideration.

No objection that the principal debtor, who has been released, will become liable to the claim of the surety.

And in such a case it is no objection to the plaintiff's claim against the surety, that the consequence of permitting him to recover will be indirectly to bring upon the principal debtor, whom the plaintiff has already discharged, a new demand through the surety, on account of the same bill; for, though by this means the release is rendered of no effect, yet as the releasing creditor was not aware of the suretyship, it would be unfair to charge him with any of the consequences resulting from that fact, the knowledge of which, it might reasonably be supposed, would have prevented his giving the release, and thereby discharging both his debtors. Thus, where an action was brought by an indorsee against the maker of a promissory note, and the defence was, that the plaintiff had executed a deed of composition as a creditor of the payee, for whose accommodation the defendant had given the note, and it was contended for the defendant, that to support the present action, would be to allow the plaintiff, who had covenanted not to sue the indorser, to defeat his own covenant by his own act; for that, if the plaintiff recovered against the defendant, the latter would have a right of action over against the indorser. But Lord *Ellenborough* answered this reasoning thus—"Twigg (the indorser) may be molested, but not by the plaintiff; taking the statement as made by the defendant's counsel to be proved, the deed stands unbroken, for the plaintiff (as he covenanted) does not sue or molest Twigg, which is all that he has covenanted to do. It is true, that the plaintiff recovering

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on the defendant in this case, may have his action over against Twigg; but it will be for money paid to his use, at the defendant's suit; the payment creates a new debt, but the old debt is satisfied as between Twigg and the plaintiff. A deed cannot be carried farther than the plain import of it between the parties." *Mallet* v. *Thompson*, 5 Esp. 178.

Remarks upon the case of *Mallet* v. *Thompson*.

The principle of this case, it is clear, would apply, though the suretyship were known to the creditor, if the instrument by which the principal debtor was discharged contained a clause reserving remedies against sureties. Such a reservation of course, *pro tanto*, defeats the effect of the creditor's junction in the composition deed; for, if the creditor, after compounding with the principal, resorts to the surety, the latter will have a claim upon the debtor; and in such a case, both the creditor and surety may become parties to the composition deed, in respect of a debt growing out of the same transaction. Thus, if A. gives to B. an accommodation acceptance for 100*l.*, which B. pays over to C., who, aware of the nature of the transaction between A. and B., compounds with B., by accepting 5*s.* in the pound, with an express reservation of his remedy against A., C. might afterwards call upon A. to pay the remaining 15*s.* in the pound, and the payment of which sum by A. would render him a creditor to that amount against B.; and, as such creditor, he also may sign the composition deed.

Misrepresentation as to the legal effect of the instrument does not restrain its effect.

But though a deed may be prevented, by express proviso, from discharging sureties, yet, it is clear that a representation by the agent of the debtor, that the creditor's execution of the deed will not prejudice his claim against a surety, does not prevent its operating to discharge the latter; because such misrepresentation relates, not to a mere matter of fact exclusively within the knowledge of the party making it, but to a rule or principle of law, with which every man is supposed to be acquainted, and therefore ought not to mislead the person to whom it is made. *Lewis* v. *Jones*, 4 Barn. & Cress. 506; 6 Dowl. & Ryl. 576.

Parol reservation of remedies against sureties, inoperative.

So, it is clear that a parol agreement, that a deed shall not have the effect of discharging sureties, will not prevent its operating such discharge; *Ex parte Glendinning*, Buck, 517; though it is equally clear, that, if an accommodation acceptor give to the holder a *written* authority to compound with the drawer, the holder will be safe in executing the composition deed. *Maltby* v. *Carstairs*, 1 Mann. & Ryl. 549; *S. C.* 7 Barn. & Cress. 735.

MUTUAL RELEASE.

MUTUAL RELEASE *by Deed Poll.*

TO ALL TO WHOM THESE PRESENTS SHALL COME, [A. B.] of &c., and [C. D.] of &c., respectively SEND GREETING. WHEREAS there have been several accounts and pecuniary transactions between the said [A. B.] and [C. D.], all of which are adjusted and settled (*a*); NOW, THEREFORE, THESE PRESENTS WITNESS, that each of them the said [A. B.] and [C. D.] *Doth* for himself and herself, his and her heirs, executors, and administrators, remise, release, acquit, and discharge the other of them, his and her heirs, executors, and administrators, and all his, her, and their estates and effects whatsoever and wheresoever, of and from all sums of money, accounts, reckonings, actions, suits, claims, and demands whatsoever, from the beginning of the world to the day of the date of these presents (*b*). IN WITNESS, &c.

(*a*) Where a release is intended to be general, it is better to avoid specifying particular transactions between the parties, as such recitals frequently are held to have the effect of restraining the instrument (*vide ante*, p. 422); but if, after detailing a particular transaction, it states that there were other transactions between the parties, of course the recital has no such restrictive operation. Such statements cannot be too large and general, where the object of the parties is universal exoneration.

Variation where release is not to extend to claims of the releasor as executor.

(*b*) If it be intended that this release shall not extend to claims by one of the parties against the other, in a representative character (as to which *vide ante*, p. 417), say—

"PROVIDED ALWAYS, and it is hereby declared, that nothing herein contained shall extend to release or discharge the said [C. D.], her heirs, executors, or administrators, from any claim or demand which the said [A. B.], as executor of the last will and testament (*or*, administrator of the goods, chattels, rights, and credits, *as the case may be,*) of [E. F.], late of ——, deceased, now hath or hereafter shall

or may have, against the said [C. D.], her heirs, executors, or administrators, by reason of any accounts, reckonings, dealings, or transactions between the said [C. D.] and the said [E. F.], deceased; any thing hereinbefore contained to the contrary notwithstanding." MUTUAL RELEASE.

MUTUAL RELEASE *by Indenture, without any Recitals, between a* PARTNERSHIP FIRM *and an* INDIVIDUAL. MUTUAL RELEASE.

THIS INDENTURE, made the —— day of ——, BETWEEN [A. B.], of &c., and [C. D.], of &c., —— and copartners, of the one part, and [E. F.], of &c., of the other part; WITNESSETH, that, in consideration of the release hereinafter contained, by and on the part of the said [E. F.], the said [A. B.] and [C. D.] *Do*, and each of them *Doth*, by these presents, remise, release, and for ever quit claim unto the said [E. F.], his heirs, executors, and administrators, All and all manner of actions, suits, cause and causes of action and suit, debts, duties, sum and sums of money, accounts, reckonings, claims, and demands whatsoever, at law and in equity, which they the said [A. B.] and [C. D.], or either of them, now have or hath, or which they or either of them, their, or either of their heirs, executors, or administrators, can, shall, or may, at any time or times hereafter, have upon or against the said [E. F.], his heirs, executors, or administrators, for or by reason or on account of any matter, cause, or thing whatsoever, up to and inclusive of the day of the date of these presents. AND THIS INDENTURE FURTHER WITNESSETH, that, in consideration of the release hereinbefore contained, by and on the part of the said [A. B.] and [C. D.], he the said [E. F.] *Doth* by these presents remise, release, and for ever quit claim unto the said [A. B.] and [C. D.], and each of them, their and each of their heirs, executors, and administrators, All and all manner of actions, suits, cause and causes of action and suit, Parties. *Testatum.* Further *testatum.*

MUTUAL RELEASE.

debts, duties, sum and sums of money, accounts, reckonings, claims, and demands whatsoever, at law and in equity, which he the said [E. F.] hath, or which he or his heirs, executors, or administrators, can, shall, or may, at any time or times hereafter, have upon or against the said [A. B.] and [C. D.], or either of them, their or either of their heirs, executors, or administrators, by reason or on account of any matter, cause, or thing whatsoever, up to and inclusive of the day of the date of these presents. IN WITNESS, &c.

CREDITOR TO DEBTOR.

RELEASE *from* CREDITOR *to* DEBTOR, *on* RECEIVING *a* SUM *of* MONEY *in* SATISFACTION *of* DISPUTED CLAIMS.

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*releasor*], of &c., of the one part, and [*releasee*], of &c., of the other part.

Recital of dealings between the parties.

WHEREAS the said [*releasor*] hath from time to time during the period of several years past, paid and advanced various sums of money to or on the account of the said [*releasee*]; and certain other dealings and transactions have taken place between them, by means whereof the said [*releasee*] became indebted to the said [*releasor*] in a considerable sum of money.

—Disputed claims.

AND WHEREAS the said [*releasor*] made certain claims and demands against the said [*releasee*], by reason of the transactions aforesaid, the validity of some part of which claims and demands was denied by the said [*releasee*]; in consequence whereof disputes and differences arose between the said parties respecting the same.

—Agreement to terminate disputes, by payment of a sum of money.

AND WHEREAS, for the purpose of terminating and adjusting such disputes and differences, it was lately agreed between the said [*releasor*] and [*releasee*], that the said [*releasee*] should pay to the said [*releasor*] the sum of 500*l.*, in full satisfaction and discharge of all claims and demands whatsoever; and that, on receiving the same, the said [*releasor*] should execute to the said [*releasee*] such

release as is hereinafter contained. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of 500*l.* of lawful money of Great Britain and Ireland paid by the said [*releasee*] to the said [*releasor*], at or before the execution of these presents, the receipt of which said sum he the said [*releasor*] doth hereby acknowledge, and therefrom doth absolutely acquit, release, and discharge the said [*releasee*], his heirs, executors, and administrators, he the said [*releasor*], for himself, his heirs, executors, and administrators, *Doth*, by these presents, remise, release, and for ever quit claim unto the said [*releasee*], his heirs, executors, and administrators, All and all manner of actions, suits, cause and causes of action and suit, debts, duties, sum and sums of money, accounts, reckonings, claims, and demands whatsoever, both at law and in equity, which he the said [*releasor*] now hath, or which he, his heirs, executors, or administrators could, should, or might, at any time or times hereafter, have upon or against the said [*releasee*], his heirs, executors, or administrators, for or by reason or on account of any matter, cause, or thing whatsoever, up to and inclusive of the day of the date of these presents. IN WITNESS, &c.

CREDITOR TO DEBTOR.

Testatum.

In consideration of a sum of money, creditor releases all claims to debtor.

RELEASE *of a Pecuniary Legacy, framed so as to bear the Receipt of the Legacy Duty* (*a*). *(Simple Form).*

LEGATEE TO EXECUTOR OF A LEGACY.

TO ALL TO WHOM THESE PRESENTS SHALL COME, [*legatee*], of &c., one of the daughters of ——, [*testator*], of

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(*a*) The 36 Geo. 3, c. 52, s. 27, (*ante*, p. 384), enacts, that no written receipt or discharge for any legacy or residue shall be received in evidence unless stamped with the duty imposed by the act; and therefore, the deed of release usually executed by a legatee to an executor is not available as a discharge, unless accompanied by the receipt denoting the payment of the legacy duty, or by evidence of the actual payment of the duty; for which reason, some practitioners always frame the release in

Remarks upon the precedent in the text.

LEGATEE TO EXECUTOR OF A LEGACY.

&c., deceased, SENDETH GREETING. WHEREAS the said [*testator*] did, in and by his last will and testament in writing,

Recital of will and probate.

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such a manner as to admit of its receiving the Stamp Office certificate of the payment of the duty. For this purpose it ought to be prepared conformably to the 27th section of the stat. 36 Geo. 3, (*ante*, p. 384), which requires that the instrument shall express the *date of the receipt or discharge, the name of the testator or intestate, and of the person or persons to whom the receipt is given, and to whom the legacy or residue is bequeathed or belongs, and the amount or value of the legacy or residue, and also the amount and rate of the duty payable and allowed thereon.* If the instrument contains these particulars (all which will be found in the precedent in the text), it may properly be impressed with the stamp for legacy duty, although it does not, in other respects, correspond with the printed forms issued by the Stamp Office. The advantage of the plan in question is, not only that it avoids the risk of the release becoming inadmissible in evidence, from its being separated from the receipt for the duty, but that it saves the additional stamp, which the deed of release would otherwise require; for the 41st section of the act 36 Geo. 3, c. 52, (*ante*, p. 391), exempts discharges stamped according to the act from all other duty. And though, undoubtedly, this exemption would not extend to any duty imposed by subsequent acts, yet, it is conceived, that, according to the tenor even of these acts, the instrument would not require any additional stamp; for, the ordinary deed stamp, which, by the act now in force, (55 Geo. 3, c. 184), is imposed on any deed "not otherwise charged," could not apply to an instrument which, by another clause in the same act, is liable to a specific denomination of duty.

Stamp Office legacy receipt in general sufficient.

But, although, for the reasons that have been suggested, it seems better, if a release is taken, that it should bear the legacy duty, yet it is conceived that, in general, an executor who pays a pecuniary legacy might safely be content with the ordinary Stamp Office legacy receipt, which will operate as completely to exonerate him from being again called on to pay the legacy, as the most elaborately framed release can do; though undoubtedly it is usual for an executor to require a release additionally to the revenue receipt, which requisition it is believed is sanctioned by the practice of the Court of Chancery, where such releases are frequently settled by the Masters. Where the payment is not of a pecuniary legacy merely, but of the balance of a residuary account, the ground for requiring a release is certainly stronger, as it is often necessary to recite facts not stated in, or capable of being conveniently introduced into the printed forms in use at the Stamp Office. If the legatee is to enter into a covenant of indemnity with the executor, of course a deed is indispensable, and which, even though it bears the legacy duty, ought additionally to be stamped with the ordinary 35*s.* stamp, as a deed of covenant.

bearing date ——, give to his son, the said [*legatee*], a legacy or sum of 2000*l.*, and appointed [*executors*], of &c., executors of his said will; and they the said [*executors*], soon after the decease of the said [*testator*], duly proved the same in the Prerogative Court of the Archbishop of Canterbury, and took upon themselves the execution thereof. AND WHEREAS the legacy duty payable for the said legacy amounts to the sum of 20*l.*, being at the rate of 1*l. per cent.* on the amount thereof. NOW THESE PRESENTS WITNESS, that the said [*legatee*] *Doth* hereby acknowledge to have had and received from the said [*executors*] the sum of 1980*l.*, being the clear balance or residue of the said legacy or sum of 2000*l.*, so as aforesaid bequeathed by the will of the said [*testator*], to the said [*legatee*], after deducting thereout the sum of 20*l.*, which has been retained by the said [*executors*] as and for the legacy duty payable thereon as aforesaid; And that of and from the same sum of 2000*l.*, and every part thereof, he the said [*legatee*] *Doth*, by these presents, for ever acquit, release, and discharge the said [*executors*], and each and every

LEGATEE TO EXECUTOR OF A LEGACY.

Testatum.

It should be stated that the plan above recommended (namely, that of impressing on the release the receipt for the legacy duty) is not excluded by the fact of the legacy being given free from duty; since such exemption applies merely as between the persons interested in the exempted and onerated funds respectively, and not as between the executor and the Crown. Indeed, the sum applicable to the duty is in effect an augmentation of the legacy, though it is observable that the act of 36 Geo. 3, cap. 52, s. 21, (*ante*, p. 380), exempts such sum from being liable to duty as part of the legacy; so that in point of fact a testator avoids a certain portion of duty by bequeathing legacies in this manner. Thus, if instead of leaving to a person who is a stranger in blood, a sum of 2000*l.* subject to legacy duty, he gives him that which *to him* is equivalent, namely, 1800*l.*, free from duty, the testator's general personal estate will be chargeable only with 180*l.* for the duty on the legacy, though, if the duty had been payable out of the subject matter of the bequest, it would have amounted to 200*l.* The difference created by this exemption seems to be as little founded in reason, as an inequality of an opposite kind arising under another enactment of the same statute, which has already been the subject of remark, *vide ante*, p. 391; though it certainly has the merit of excluding the question, (which would otherwise have called for determination), whether the duty on the sum to be applied in satisfaction of the legacy-duty should come out of the fund onerated with the rest of the duty, or be borne by the legatee.

Effect of exempting legacy from duty.

LEGATEE TO EXECUTOR OF A LEGACY.

of them, and each and every of their heirs, executors, and administrators, and all the estates and effects whatsoever and wheresoever late of the said [*testator*], deceased; And also, that the said [*legatee*], for himself, his heirs, executors, and administrators, *Doth*, by these presents, remise, release, and for ever quit claim unto the said [*executors*], and each and every of them, and their and each and every of their heirs, executors, and administrators, All and every actions and action, suits and suit, causes and cause of action or suit, claims and demands whatsoever, of him the said [*legatee*], for or in respect of the said sum of 2000*l.*, or the interest thereof, or any part thereof respectively. IN WITNESS, &c.

OF LEGACY BEQUEATHED TO A MARRIED WOMAN.

RELEASE *by Deed Poll by a* LEGATEE *and her* HUSBAND, *to* EXECUTORS, *of two* PECUNIARY *Legacies.*

TO ALL TO WHOM THESE PRESENTS SHALL COME, [*husband of legatee*], of &c., and [*wife*], his wife, respectively SEND GREETING. WHEREAS [*testator*], late of ——, duly made and published his last will and testament in writing, bearing date the —— day of ——, and did thereby *(inter alia)* give and bequeath to his niece, the said [*wife*], therein described as the wife of the said [*husband*] (*a*), the sum

Recital of will bequeathing legacy;

Legacy should be given to the wife, and not to the husband, where she is the testator's relation.

(*a*) The gift of an immediate absolute legacy to a married woman operates in effect as a legacy to the husband, who is entitled to receive it, subject indeed to the right of the executors to insist on a settlement in her favour; which, however, is rarely done, unless the embarrassed circumstances or bad conduct of the husband call for it. Where the husband is intended to take the benefit of the bequest, the testator sometimes makes him the legatee instead of the wife; but this in general is objectionable, if the wife is the testator's relation, and the husband is not, because it subjects the legacy to a higher rate of duty. So, where the testator wishes to cancel a debt owing to him from the husband, it is for the same reason advisable to bequeath it as a legacy to the wife, who is the testa-

of 1500*l.* of lawful money of Great Britain, to be paid within the space of two years next after his decease, with interest for the same, after the rate of 5*l. per centum per annum*, from the day of his decease; And, after having charged the residue of his real and personal estate with the payment of his debts and legacies, the said testator did constitute and appoint [*executors*], executors of his will: And whereas the said [*testator*] duly made and published a codicil to his last will and testament, bearing date the —— day of ——, and did thereby *(inter alia)* give and bequeath unto his niece, the said [*wife*], 1000*l.* in addition to what he had given to her by his said will, and to be paid as the original legacy was directed to be paid, and did thereby in all other respects confirm his said will. And whereas the

OF LEGACY BEQUEATHED TO A MARRIED WOMAN.

and appointing executors.

—Codicil, giving further legacy.

—Second codicil, appointing another executor.

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tor's relation, rather than forgive it to the husband, who is a stranger in blood to him. The utility of this precaution is suggested to the Editor by a case which occurred within his observation, in which a lady, by her will, forgave to the husband of her niece a large debt. Soon after the testatrix's decease, the husband became bankrupt, and the estate did not yield the smallest dividend; so that, if the executors were bound to pay the duty of 10*l. per cent.*, (from which there seemed no very obvious mode of escaping), this heavy impost would be paid for a legacy of no real value; for, if the debt had not been forgiven, it would not have produced one shilling to the testatrix's estate. Whether the duty was ultimately paid, the Editor does not know; but the case left upon his mind a strong impression of the expediency, in all instances where the wife is a relation, and the husband not a relation of the testator, of bequeathing the debt to the wife rather than forgiving it to the husband, by which means the duty in the case referred to, instead of being 10*l. per cent.* on the amount, would have been 3*l. per cent.* only, making a difference of no less than 7*l. per cent.* on several thousand pounds; and if the husband had been the son-in-law of the testator, the difference would have been increased to 9*l. per cent.* Of course the legacy would be liable to lapse if the wife died in the lifetime of the testator, but this might be prevented by an express bequest to the husband in such event.

As to duty on joint legacy to husband and wife.

It should be observed, that if a legacy be given to the husband and wife jointly, it will be liable in moieties to the different rates of duty payable by them respectively; and therefore, where a testator bequeathed the residue of his personal estate to B., his son-in-law, and P., the wife of B., the testator's daughter, for their absolute benefit, it was held, that the legacy was liable to the payment of 1*l. per cent.* as to one moiety, and 10*l. per cent.* as to the other. *Attorney-General* v. *Bacchus*, 9 Price, 30.

OF LEGACY BEQUEATHED TO A MARRIED WOMAN.

—Death of testator.

said [*testator*], did by a second codicil to his said will, bearing date the —— day of ——, constitute and appoint his friend [*executor*], of &c., one of his trustees and executors jointly with those named in his said will. AND WHEREAS the said [*testator*] departed this life some time in the month of ——, without having altered or revoked the said two legacies of 1500*l.* and 1000*l.*, so by him bequeathed to the said [*wife*], in and by his said will and first codicil as aforesaid.

Testatum.

Husband and wife respectively acknowledge receipt of legacies of 1500*l.* and 1000*l.*, and release executors from all demands in respect thereof.

NOW THESE PRESENTS WITNESS, that the said [*husband*] and [*wife*], his wife, do hereby respectively acknowledge, declare, and testify that they have actually had and received, before the sealing and delivery of these presents, of and from the executors and trustees named and appointed in and by the said recited will and codicil of the said [*testator*], deceased, or some or one of them, as well the said legacy or sum of 1500*l.* by the said will of the said [*testator*], bequeathed to the said [*wife*], and thereby made payable to her within two years after his decease, with interest from the day of his decease, as also the said legacy or sum of 1000*l.* by the said first-mentioned codicil to the said will bequeathed to the said [*wife*] as aforesaid, and all interest payable in respect thereof, or of either of them; and they the said [*husband*] and [*wife*], his wife, for themselves, and each of them, their and each of their heirs, executors, and administrators, in consideration of the said two several sums of 1500*l.* and 1000*l.*, and interest, do hereby remise, release, and for ever quit claim unto the said [*executors*], and each and every of them, and the heirs, executors, and administrators of each and every of them, and the heirs, executors, and administrators for the time being of the said [*testator*], deceased, all and all manner of action and actions, cause and causes of action, covenants, agreements, suits, controversies, differences, debts, duties, legacies, accounts, reckonings, sum and sums of money, and all other claims and demands whatsoever, both at law and in equity which they the said [*husband*] and [*wife*], his wife, or either of them, or the heirs, executors, or administrators of either of them, at any time or times hereafter, can or may have, claim, challenge, or demand against the said [*executors*], or any or either of them, or the heirs, executors, or administrators of any or either of them, or the executors or administrators for the

time being of the said [*testator*], deceased, or any of them, for or by reason or means of the said several legacies or sums of 1500*l.* and 1000*l.*, or either of them, or the interest thereon, or any part thereof respectively. IN WITNESS, &c.

OF LEGACY BEQUEATHED TO A MARRIED WOMAN.

RELEASE *to* EXECUTORS *of a* LEGACY *for* 10,000*l.*, *which had been settled on the* MARRIAGE *of the* LEGATEE.

OF A LEGACY WHICH HAS BEEN SETTLED ON THE LEGATEE'S MARRIAGE.

TO ALL TO WHOM THESE PRESENTS SHALL COME, the Right Honourable [*husband of legatee*], and the Right Honourable [*legatee*], his wife, late [*legatee by maiden name*], spinster, (one of the daughters of [*testator*], late of ——, deceased); [*trustees*], of &c., (trustees named in the settlement made on the marriage of the said [*husband*] and [*legatee*], his wife), severally SEND GREETING: WHEREAS the said [*testator*], by his last will and testament in writing, bearing date on or about the —— day of ——, in the year ——, gave and bequeathed to his friends [*executors*], of ——, their executors, administrators, and assigns, the sum of 10,000*l.*, to be paid immediately or as soon as conveniently might be after his decease, Upon trust to lay out the same at interest either on Government or other public stocks, funds, or securities, and pay the interest, dividends, and annual proceeds thereof, to his the said [*testator's*] daughter [*legatee*], or her assigns, during the term of her natural life, or until she should marry; And in case she should marry with the consent of the said [*executors*], or the survivor of them, or the executors or administrators of such survivor, then *Upon trust* to settle the said sum of 10,000*l.*, upon or for the benefit of her the said [*legatee*] and her husband, and their issue, in such manner and form in all respects, and for that purpose appoint such trustees thereof, or otherwise to pay the said sum of 10,000*l.*, or any part thereof, to the husband of the said [*legatee*] upon his making such competent settlement upon or by way of jointure,

Recital of will.

OF A LEGACY WHICH HAS BEEN SETTLED ON THE LEGATEE'S MARRIAGE.

and upon his issue by her, as they the said [*executors*], or the survivor of them, his executors or administrators, should in their discretion think proper and expedient; And the said testator directed that the legacy duty payable on the said sum of 10,000*l.* should be paid and satisfied out of his general personal estate; And the said testator appointed the said [*executors*] executors of his said will. And whereas the said [*testator*] died on or about the —— day of ——, without altering or revoking his said will as to the bequest aforesaid. And the said will hath been duly proved by the said executors in the Prerogative Court of the Archbishop of Canterbury. And whereas, by indenture of four parts, bearing date on or about the —— day of ——, in the year ——, and made or expressed to be made between the said [*husband*], of the first part; the said [*legatee*], then [*legatee by maiden name*], spinster, of the second part; the said [*executors*], of the third part; and the said [*trustees*], of the fourth part (being the settlement made previously to and in contemplation of the marriage then intended, and shortly afterwards had between the said [*husband*] and [*legatee*], now his wife); after reciting the will of the said [*testator*] to the effect hereinbefore recited; and that such marriage was intended to be had with the consent and approbation of the said [*executors*]; and that, in pursuance of the trust reposed in them by the said will, they the said [*executors*], upon the treaty for the said marriage, had agreed to settle the sum of 10,000*l.* thereby bequeathed to them in trust for the said [*legatee*] as aforesaid, in the manner thereinafter expressed, and for that purpose had appointed the aforesaid [*trustees*] to be trustees thereof; but, in regard that the said [*executors*], as executors of the said [*testator*], had not then paid all his debts, nor got in and possessed themselves of all his personal estate, they could not then pay any part of the said legacy or sum of 10,000*l.* so bequeathed in trust as aforesaid; *It was declared and agreed*, by and between the said parties hereto, and particularly by the said [*executors*], that, in case the said then intended marriage should take effect, the said legacy or sum of 10,000*l.*, in and by the said will of the said [*testator*] given and bequeathed unto the said [*executors*] in trust for the said [*legatee*] as aforesaid, should, when and so soon as the said [*executors*] should have assets in their hands sufficient and applicable to the

—Death of testator, and probate of his will.

—Indenture of settlement.

payment thereof, be laid out and invested in or upon Government or other public stocks, funds, or securities, or upon real securities, at interest, in the names of the aforesaid [*trustees*], or in the name or names of the survivor or survivors of them, or the executors or administrators of such survivor; and that they the said [*trustees*], or the survivors or survivor of them, or the executors or administrators of such survivor, should stand and be possessed of all and singular the stocks, funds, and securities, in or upon which the said legacy or sum of 10,000*l.* should be so laid out or invested as aforesaid, Upon the several trusts, and for the intents and purposes, and under and subject to the powers, provisoes, declarations, and agreements thereinafter expressed, declared, and contained of and concerning the same.

OF A LEGACY WHICH HAS BEEN SETTLED ON THE LEGATEE'S MARRIAGE.

AND WHEREAS, in pursuance of the said agreement in that behalf contained in the said in part recited indenture of settlement, the said legacy or sum of 10,000*l.*, in and by the said in part recited will of the said [*testator*], deceased, given and bequeathed to them the said [*executors*], in trust for the said [*legatee*] as aforesaid, hath been laid out and invested by them in the purchase of the sum of 12,380*l.*, Three Pounds *per centum* Consolidated Annuities, which hath this day been transferred into the names of the said [*trustees*], in the books of the Governor and Company of the Bank of England, upon the trusts in the indenture of settlement expressed and declared of and concerning the same; And all interest hitherto accrued and become due for the said sum of 10,000*l.*, hath been paid to the said [*legatee*], who was entitled thereto under the trusts of the said settlement, as they the said [*trustees*], and [*husband*], and [*legatee*], his wife, do hereby respectively acknowledge.

—That legacy had been invested in 3*l. per cent.* Consols.

And that all interest had been paid.

AND WHEREAS the legacy duty payable to his Majesty on the said legacy or sum of 10,000*l.* amounts to the sum of 1000*l.* (*a*), being at the rate of ten *per cent.* on the amount thereof, which said sum of 1000*l.* the said [*executors*] have

—That executors had provided for the legacy duty.

(*a*) This precedent illustrates an observation, *ante*, p. 455. The legatee, though described as the child of the testator, was illegitimate, so that the *maximum* duty of 10*l. per cent.* applicable to strangers in blood, became payable.

OF A LEGACY WHICH HAS BEEN SETTLED ON THE LEGATEE'S MARRIAGE.

Release by legatee and her husband, and the trustees of her marriage settlement.

provided and retained out of the general personal estate of the said testator, pursuant to the directions in that behalf contained in his said will. NOW THEREFORE KNOW YE, that, in consideration of such investment, transfer, and payment respectively as aforesaid, and of all and singular other the premises, they the said [*husband*] and [*legatee*], his wife, and [*trustees*], *Have*, and every of them [*Hath*, released, acquitted, exonerated, and for ever discharged, and (*b*)] by these presents *Do*, and every of them *Doth*, release, &c., the said [*executors*], and every of them, their and the heirs, executors, and administrators of every of them, and their and every of their lands and tenements, goods and chattels, and also the estate and effects of the said [*testator*], deceased, of and from the said legacy or sum of 10,000*l.* in and by his said last will and testament given and bequeathed to the said [*executors*] in trust for the said [*legatee*] as aforesaid, and all interest hitherto accrued and become due for the same, and also of and from all and all manner of action and actions, suit and suits, cause and causes of action and suit, sum and sums of money, debts, accounts, reckonings, controversies, damages, claims, and demands whatsoever at law and in equity, which they the said [*husband*], and [*legatee*], his wife, and [*trustees*], or any of them, now have or hath, or ever had, or which the executors, administrators, or assigns of them, or any of them, could or might (if these presents had not been made), have had, claimed, or demanded, from or against them the said [*executors*], or any of them, or the heirs, executors, or administrators, of them or any of them, or of, from, or against the estate and effects of the said [*testator*], deceased, for or on account of the said legacy or sum of 10,000*l.*, or any part thereof, or any interest for the same, or for or by reason or means or on account of any act, transaction, matter, or thing whatsoever in anywise relating thereto. IN WITNESS, &c.

(*b*) The words in brackets are now usually omitted; and as the reason which affords some apology for their original introduction into, though it does not justify their continued adoption in, deeds of conveyance (*vide ante*, Vol. 4, p. 114), does not apply to releases, they ought to be wholly disused.

RELEASE *to* EXECUTORS, *by a* SURVIVING RESIDUARY LEGATEE, *and the* EXECUTORS *of a deceased* RESIDUARY LEGATEE. *(Variation where a Covenant to* PAY *any* UNSATISFIED DEBTS *of the Testator that may be discovered, and also generally to indemnify, is added).*

BY RESIDUARY LEGATEES TO EXECUTORS.

TO ALL TO WHOM THESE PRESENTS SHALL COME, [*surviving legatee*], of &c., and [*executors of deceased legatee*], of &c., severally SEND GREETING. WHEREAS [*testator*], late of ——, made and duly published his last will and testament in writing, bearing date on or about the —— day of ——, and thereby, after appointing [*executors*], of &c., executors of his said will, directed them to pay his debts, and, after payment thereof, and of the pecuniary legacies thereinafter bequeathed, to invest the residue of the money arising from his personal estate in the 3*l. per cent.* Consolidated Bank Annuities; And the said testator bequeathed the income thereof to his father, [L. M.], during his natural life; and, after his decease, the said testator gave and bequeathed one half of the said annuities to his brother, [*surviving legatee*], and the other half to his brother-in-law, the said [*deceased legatee*]; and the said testator bequeathed some small pecuniary legacies to the persons therein named. AND WHEREAS the said testator departed this life on the —— day of ——, without having altered or revoked his said will; and the said executors duly proved the same will in the Prerogative Court of the Archbishop of Canterbury. AND WHEREAS the said [*deceased legatee*] departed this life on or about the —— day of ——, having first duly made and published his last will and testament, bearing date the —— day of ——, whereby, after reciting the said will of the said [*testator*], deceased, he gave and bequeathed all the interest and property he then had or might be entitled to under or by virtue of the said will, unto the said [*executors of deceased legatee*], *In trust* that they or the survivor of them *(recite the*

Recital of will of original testator.

Death of testator.

—Decease and will of one of the residuary legatees.

BY RESIDUARY LEGATEES TO EXECUTORS.

trusts contained in the will) (*a*); And the said [*legatee*] nominated and appointed the said [*executors of deceased legatee*] executors of his said will; and the said [*executors of deceased legatee*] duly proved the same will in the said Prerogative Court. AND WHEREAS the said [L. M.], the father of the said testator, [*testator*], died on or about the —— day of ——. AND WHEREAS the said [*executors*] have paid and satisfied all the debts of the said testator, [*testator*], so far as the same have come to their knowledge, and also his funeral and testamentary expenses, and the pecuniary and specific legacies bequeathed by his will; and the clear residue of the personal estate of the said [*testator*] now consists of £—— 3*l. per cent.* Consolidated Bank Annuities, to one moiety of which the said [*surviving legatee*] is entitled, and to the other moiety of which the said [*executors of deceased legatee*] are entitled, as executors of the said [*deceased legatee*] deceased, subject, as to both the said moieties, to the payment of such of the debts (if any) of the said testator, [*testator*], as now remain unpaid. AND WHEREAS the said [*surviving legatee*] and [*executors of deceased legatee*] have carefully examined the accounts of the said [*executors*], as executors as aforesaid, and the amount and application of the personal estate of the said testator, [*testator*], deceased, and the different vouchers for the same, and are perfectly satisfied with such accounts. AND WHEREAS the said [*executors*], at the request of the said [*surviving legatee*] and [*executors of deceased legatee*], (testified by their respectively executing these presents), have, previously to the execution of these presents, transferred one moiety of the said £—— 3*l. per centum* Consolidated Bank Annuities into the name of the said [*surviving legatee*], and the other moiety thereof into the names of the said [*executors of deceased legatee*], in the books of the Governor and Company of the Bank of England, as they, [*surviving legatee*] and [*executors of deceased legatee*], do respectively hereby acknowledge. NOW KNOW YE, AND

—Decease of prior legatee for life.

—That the executors of the first testator's will had paid his debts, legacies, &c.

—That the legatees are satisfied with the executors' accounts.

—Transfer of stock by the executors into the names of the legatees.

Testatum.

(*a*) But as the trustees are also executors, in which character they are competent to give the discharge, it seems unnecessary to detail the trusts, and then the words would be—

"unto the said [*executors*], upon certain trusts therein mentioned."

BY RESIDUARY LEGATEES TO EXECUTORS.

THESE PRESENTS WITNESS, that, in consideration of the transfer of the said £—— 3*l. per centum* Consolidated Bank Annuities, so made in manner hereinbefore mentioned, and in consideration of other the premises, the said [*surviving legatee*], and [*executors of deceased legatee*], *Do*, and every of them *Doth*, by these presents, remise, release, and for ever quit claim unto the said [*executors*], and each of them, and the heirs, executors, and administrators of each of them, and the executors and administrators of the said [*testator*], deceased, all and all manner of actions, suits, cause and causes of action and suit, debts, duties, sum and sums of money, accounts, reckonings, legacies, claims, and demands whatsoever, at law and in equity, which they the said [*surviving legatee*] and [*executors of deceased legatee*], or any of them, or any other person or persons on the account of them or any of them, now have or hath, or which they or any of them, or the heirs, executors, or administrators of them or any of them, can, shall, or may, at any time or times hereafter, have, claim, challenge, or demand, upon or against the said [*executors*] or either of them, their or either of their heirs, executors, or administrators, or other the executors or administrators for the time being of the said testator, deceased, for or by reason or on account of the personal estate of the said testator, [*testator*], deceased, or any part or parts thereof, or for or by reason or means of any act, matter, or thing in anywise relating thereto (*b*). AND the said [*sur-*

In consideration of transfer of stock, transferees release to executors.

Legatees

(*b*) As the executors would be liable to satisfy any latent claims on the testator's estate, it seems reasonable that, previously to parting with the stock, they should have from the legatees a covenant to refund in case of any such claims being made. But where, as in the instance of the precedent in the text, the whole or part of such fund is transferred to persons who have no beneficial interest, an obstacle exists to their obtaining such a covenant, as it is not to be expected that executors in trust should render themselves personally responsible in this manner. The following variations, therefore, have been adapted to the case of a person beneficially interested under the will of the deceased legatee joining with the surviving legatee in entering into the covenant.

Variation where surviving legatee and a person interested under the will of the deceased legatee, join in a covenant of indemnity to the executor.

"AND WHEREAS it has been considered, that, although the said [*executors*] have paid and satisfied all the debts owing from the said [*testator*], deceased, which have come to their

Recital of possible existence of unpaid debts.

declare that the sum transferred shall stand charged with the debts of the testator, if any.

viving legatee], as to one moiety of the said £—— 3*l. per centum* Consolidated Bank Annuities; and the said [*execu-*

—And agreement to indemnify.

knowledge, yet some latent claims and demands against his estate may yet remain unsatisfied; and therefore, and for the purpose of saving harmless the said [*executors*] from all risk by reason thereof, the said [*surviving legatee*], and [A. B.], who, under the hereinbefore recited trusts of the will of the said [*deceased legatee*], is entitled to a beneficial interest in the moiety of the said 3*l. per cent.* Consolidated Bank Annuities which passed by such will, have consented and agreed to enter into the covenant with the said [*executors*], hereinafter contained.

Further *testatum.*

NOW THESE PRESENTS FURTHER WITNESS, that they the said [*surviving legatee*] and [A. B.], do hereby, for themselves, their heirs, executors, and administrators jointly, and each of them, for himself, his heirs, executors, and administrators severally, Doth covenant and agree with the said [*executors*], their executors and administrators, that, in case at any time or times hereafter it shall be discovered that any debts or debt, or sums or sum of money due or owing from the said [*testator*], deceased, still remain or remains unsatisfied, and the said [*executors*], or any or either of them, or the executors or administrators of them or any or either of them, or other the personal representative or representatives for the time being of the said [*testator*], deceased, shall be called on and required to pay such debts or debt, sums or sum of money, then and in such case, and so often as the same shall happen, the said [*surviving legatee*], and [A. B.], respectively, and their respective heirs, executors, and administrators, or some or one of them, will forthwith pay, or cause to be paid, to the said [*executors*], or the survivor of them, or the executors of such survivor, or other the personal representatives or representative for the time being of the said [*testator*], deceased, such sum or sums of money as they or he shall have been so called on and required to pay as aforesaid; *And further*, that they, the said [*surviving legatee*] and [A. B.], respectively, and their respective heirs, executors, and administrators, will, at all times hereafter, effectually save harmless and keep indemnified the said [*executors*] respectively, and their re-

Joint and several covenant with executors to pay any unsatisfied claims.

—And generally to indemnify executors.

tors of deceased legatee], as to the remaining moiety thereof, do hereby respectively covenant and declare, that the sum of £—— 3*l. per centum* Consolidated Bank Annuities are and shall continue subject to the payment of all such debts, if any, of the said testator, [*testator*], deceased, as now remain unpaid or unsatisfied. In witness, &c.

BY RESIDUARY LEGATEES TO EXECUTORS.

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spective executors and administrators, and other the personal representatives or representative for the time being of the said [*testator*], deceased, from and against all costs, charges, damages, and expenses whatsoever, by reason or in consequence of the said transfer so as aforesaid made by the said [*executors*] as aforesaid, of the said £—— 3*l. per cent.* Consolidated Bank Annuities into the name of the said [*surviving legatee*], and of the transfer of the said £—— like annuities into the names of the said [*executors of deceased legatee*], or of any matter, cause, or thing in anywise relating thereto. *Provided always*, and it is hereby declared, that nothing herein contained shall extend, or be construed to extend, to bind or render liable the said [*surviving legatee*], his heirs, executors, or administrators, to the payment of any greater or larger sum than the value of the said £—— 3*l. per cent.* Consolidated Bank Annuities, transferred into the name of him the said [*surviving legatee*] as aforesaid, according to the market price thereof on the day of such transfer, nor to bind or render liable the said [A. B.], his heirs, executors, or administrators, to the payment of any greater or larger sum than the value of the said £—— 3*l. per cent.* Consolidated Bank Annuities so transferred into the names of the [*executors of deceased legatee*] as aforesaid, according to the market price thereof on the day of such transfer; any thing hereinbefore contained to the contrary notwithstanding. In witness, &c."

Proviso, limiting the responsibility of each covenantor to the value of stock transferred.

RESIDUARY LEGATEE TO A SURVIVING EXECUTOR.

GENERAL RELEASE *from a* RESIDUARY *Legatee to a Surviving Executor, with Special* RECITALS *of Transactions in the Trust, by which Losses had accrued, and the Executors had incurred Responsibility; and also a* COVENANT *of* INDEMNITY *against the* COVENANTS *of Leases assigned by the Executor to the Legatee.*

THIS INDENTURE, made the —— day of ——, 18—,

Parties.

BETWEEN [*legatee*], of &c., of the one part, and [*surviving executor*], of &c., of the other part.

Recital of will, &c.

(Recite the will of the testator, whereby the whole of his real and personal property was devised and bequeathed to his executors, in trust to sell and convert the same, and invest the monies arising therefrom in government or real security, for the benefit of the testator's widow, for life, and, after her decease, in trust for the legatee, his nephew, absolutely; also, the death of the testator without revoking or altering his will, and probate thereof by the two executors).

—Of the death of legatee for life.

AND WHEREAS the said [*widow*] departed this life on the —— day of ——, having from time to time during her life received from the said [*executors*] the dividends and interest arising from the funds in which the trust monies constituting the residuary personal estate of the said [*testator*], deceased, had been invested; and also the rents and income arising from so much of the said trust estate as from time to time remained unsold and unconverted.

—Of death of releasee's co-executor.

AND WHEREAS the said [*deceased executor*] also departed this life on the —— day of —— last.

—That the deceased co-executor had assumed the principal management.

AND WHEREAS the said [*surviving executor*], during the life of his co-executor, the said [*deceased executor*], did not personally act or interfere in the management of the affairs of the said trust estate, except for the purpose of executing conveyances, and transferring funds, and performing other acts of a similar nature, at the instance and request of the

said [*deceased executor*], who had been the confidential agent and adviser of the said testator, and was more intimately conversant with his affairs than the said [*surviving executor*]; on which account the said [*deceased executor*], with the consent and acquiescence of the said [*surviving executor*], assumed the entire and exclusive management of the said trust estate. AND WHEREAS the said [*surviving executor*] having great confidence in his co-executor, the said [*deceased executor*], did not obtain from him full and satisfactory explanations as to the intended employment and application of the monies which from time to time, by the means aforesaid, were placed at the sole and exclusive disposal of the said [*deceased executor*]. AND WHEREAS, upon the decease of the said [*deceased executor*], an investigation of the affairs of the said trust estate took place, when it was discovered that he had applied to his own use certain sums of money, the produce of portions of the said trust property, which had been sold by the said [*deceased executor*] and [*surviving executor*], as aforesaid, and had otherwise neglected the due execution of the trusts created by the said recited will; particularly, in omitting to sell and convert into money certain parts of the said residuary trust estate; by reason whereof the said [*widow*] had received out of the said trust property an annual income considerably exceeding what she would have been entitled to if the said trust property had been duly converted, and the produce thereof invested pursuant to the trusts of the said recited will (*a*); and the value and amount of the reversionary interest of the said [*legatee*], under or by virtue of the said will, had been proportionally diminished and deteriorated. AND WHEREAS the estate of the said [*deceased executor*], at the time of his decease, was insolvent, and wholly inadequate to the payment of his debts; and therefore, the said [*legatee*] called upon and required the said [*surviving executor*] to make good the said losses and deficiencies which accrued to the said trust

RESIDUARY LEGATEE TO A SURVIVING EXECUTOR.

—That the releasee had placed monies at the disposal of his co-executor, without information as to the application thereof.

—That various breaches of trust had been discovered to have been committed by the deceased executor.

—That deceased executor had died insolvent.

(*a*) As to this point, *vide ante*, Vol. 6, pp. 307, 309. When breaches of trust have been committed, to which the release is meant to extend, it is better to recite them, in order to preclude the allegation of their not having been known to, or in the contemplation of, the releasor. *Vide ante*, p. 412.

RESIDUARY LEGATEE TO A SURVIVING EXECUTOR.

estate by reason of the transactions aforesaid. And whereas the said [*surviving executor*] having declared his intention to resist the said claim and requisition of the said [*legatee*], he filed a bill in the High Court of Chancery against the said [*surviving executor*] and the administrator of the goods, chattels, and credits of the said [*deceased executor*], for the purpose principally of charging the said [*surviving executor*] with the losses and deficiencies arising from the hereinbefore recited proceedings in the said trust; and the said [*surviving executor*] put in an answer to the said bill.

That legatee had filed a bill in Chancery against the surviving executor, &c.

Agreement for compromise.

And whereas, for the purpose of preventing further litigation between the said [*surviving executor*] and [*legatee*], and in regard that the said [*legatee*] is now fully convinced that the said [*surviving executor*] was ignorant of the breaches of trust committed by the said [*deceased executor*], and that the conduct of the said [*surviving executor*] arose entirely from an erroneous conception of the duties legally devolving upon him as such executor as aforesaid, and not from any corrupt or dishonourable motive; and taking into consideration, moreover, the long and intimate friendship that subsisted between the said [*surviving executor*] and the said testator, the said [*legatee*] hath consented to enter into the following arrangement and compromise with the said [*surviving executor*]; that is to say, that the said [*surviving executor*] should pay the bill of costs of the solicitor of the said [*legatee*], as well in and about the said suit in Chancery, as otherwise for business transacted in relation to the said claim of the said [*legatee*] against the said [*surviving executor*]; and should, at the costs and charges of the said [*surviving executor*], deliver up and effectually assign and transfer to the said [*legatee*], all and singular the trust estates, monies, and property now in the hands of the said [*surviving executor*]; and that thereupon the said [*legatee*] should allow the said suit to be dismissed, and should also execute to the said [*surviving executor*] a general release in manner hereinafter contained; and it was further agreed by and between the said [*legatee*] and [*surviving executor*], that, inasmuch as part of the said trust estate consisted of leasehold property, held subject to the payment of rents, and to the observance and performance of certain covenants, to which the said [*surviving executor*], as the personal representative of the said

[*testator*], deceased, would continue liable notwithstanding the assignment thereof intended to be made to the said [*legatee*], the said [*legatee*] should execute to the said [*surviving executor*] such covenant of indemnity concerning the same as is hereinafter contained (*b*); *And lastly*, it was agreed that the costs of these presents, and otherwise attending the execution of the said agreement, should be paid by the said [*surviving executor*]. And whereas, in pursuance of the said agreement, the said [*surviving executor*] hath paid the bill of costs of Mr. ——, the solicitor of the said [*legatee*], in the said suit of "[*plaintiff*] v. [*defendant*]," and otherwise concerning the matters aforesaid, amounting to the sum of £——. And whereas, in further pursuance of the said agreement, by indenture of even date herewith, made between the said [*surviving executor*] of the one part, and the said [*legatee*] of the other part, the said [*surviving executor*] hath assigned to the said [*legatee*] all and singular the messuages, gardens, and pieces or parcels of ground, situate at ——, lately belonging to and in the occupation of the said [*testator*], deceased, and held by him under two indentures of lease, one of them bearing date the —— day of ——, for the term of —— years, commencing from the —— day of ——, at the yearly rent of £——, and the other of them bearing date the —— day of ——, for the term of —— years from the —— day of ——, at the yearly rent of £——, and subject to certain covenants and agreements on the part of the said [*testator*], his executors, administrators, and assigns, to be observed and performed. And whereas, in further pursuance of the said agreement, the said [*surviving executor*] hath this day transferred into the name of the said [*legatee*] the sum of £—— Long

RESIDUARY LEGATEE TO A SURVIVING EXECUTOR.

—Execution of agreement by release.

—Of assignment of leaseholds of even date.

—Of the transfer of funds.

(*b*) It is clear that the executor of a lessee assigning leaseholds to a legatee, whether specific or residuary, is entitled to an indemnity against the rent and covenants of the lease, to which, notwithstanding the assignment, he continues liable to the extent of the assets that have reached his hands. *Simmons* v. *Bolland*, 3 Mer. 547, stated *ante*, Vol. 3, p. 383, 2nd ed. It seems better to introduce the covenant into this deed than into the deed of assignment, as that is delivered up to the legatee, though, as between a vendor and purchaser, the covenant is frequently, in order to avoid expense, inserted in the assignment.

RESIDUARY LEGATEE TO A SURVIVING EXECUTOR.

Annuities, and also the sum of £—— New 4*l. per cent.* Annuities, constituting other part of the property of the said [*testator*], deceased. AND WHEREAS, in further pursuance of the said agreement, the said [*surviving executor*] hath this day paid to the said [*legatee*] the sum of £——, being the balance remaining in the hands of Messrs. —— & Co., of ——, bankers, to the credit of the said trust estate of the said [*testator*], deceased; which said sum of £—— constitutes the entire residue of the said trust property in the hands of the said [*surviving executor*] as aforesaid. AND WHEREAS the said [*surviving executor*] having in manner aforesaid performed the whole of his part of the hereinbefore recited agreement, the said [*legatee*] in pursuance thereof on his part, hath caused the bill filed by him in the said Court of Chancery, as hereinbefore recited, in the said cause of "[*plaintiff*] v. [*defendant*]," to be dismissed.

—Payment of money balance.

—That bill in Chancery had been dismissed.

Testatum.

Release by legatee to surviving executor.

NOW THIS INDENTURE WITNESSETH, that, in further pursuance of the said agreement on the part of the said [*legatee*], and for and in consideration of the premises, he the said [*legatee*] doth by these presents acquit, release, exonerate, and for ever discharge the said [*surviving executor*], his heirs, executors, and administrators, and his and their lands and tenements, goods and chattels, of and from all and every the trusts reposed in the said [*deceased executor*] and [*surviving executor*], in and by the said hereinbefore in part recited will of the said [*testator*], as such trustees and executors as aforesaid, and which devolved upon and became vested in the said [*surviving executor*] by survivorship as aforesaid, And of and from all and all manner of action and actions, suit and suits, cause and causes of action or suit, debts, dues, sum and sums of money, accounts, reckonings, judgments, bills, bonds, specialties, damages, claims, and demands whatsoever, either at law or in equity, which the said [*legatee*] now hath, or which he, his heirs, executors, or administrators, may hereafter have, claim, challenge, bring, or be entitled unto, upon or against the said [*surviving executor*], his heirs, executors, or administrators, for or by reason or means or on account of the trusts contained in the hereinbefore recited will of the said [*testator*], deceased, or of any acts, proceedings, neglects, or defaults of him the said [*surviving executor*], either concurrently with the said

[*deceased executor*] in his life-time, or solely since his decease, or in any other manner howsoever, or for or by reason or in consequence of any losses, diminution, damages, or expenses which may have happened or accrued to, or have been incurred by, the trust estate of the said [*testator*], deceased, or to or by the said [*legatee*], by reason or in consequence of such acts, proceedings, neglects, or defaults, or of any other matter, cause, or thing incidental to, or connected with, the said trust estate, or the will of the said testator, whether the same have been particularly mentioned or referred to in the recitals of this present indenture or not (*c*). AND THIS INDENTURE FURTHER WITNESSETH, that, in consideration of the premises, he, the said [*legatee*], for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said [*surviving executor*], his executors and administrators, that he, the said [*legatee*], his heirs, executors, and administrators, shall and will from time to time and at all times hereafter well and effectually save harmless and keep indemnified the said [*surviving executor*], his heirs, executors, and administrators, *And also* the heirs, executors, or administrators for the time being of the said [*testator*], deceased, from and against all sum and sums of money, losses, costs, charges, damages, and expenses whatsoever, which he or they shall or may pay, bear, sustain, incur, or be put unto by reason or on account of the non-observance or non-performance by

RESIDUARY LEGATEE TO A SURVIVING EXECUTOR.

Further *testatum.*

Covenant of indemnity.

(*c*) As to the doctrine that the general words of a release are restrained by the recital, *vide ante*, p. 422.

If the releasing party has any claims against the releasee in his own right, to which the release is not to extend, the following proviso, though not it is conceived necessary (*vide ante*, p. 417), may be usefully added, for the purpose of excluding all doubt.

"PROVIDED ALWAYS, and it is hereby declared, that nothing herein contained shall extend to release or prejudice any claim or demand which the said [*legatee*] now hath, or which he, his executors or administrators, may hereafter have against the said [*surviving executor*], in any manner other than in the capacity or character of legatee named in the will of the said [*testator*], deceased, any rule of law or equity to the contrary notwithstanding."

Variation where release is restrained to claims by the releasor as legatee.

RESIDUARY LEGATEE TO A SURVIVING EXECUTOR.

the said [*legatee*], his executors, administrators, or assigns, of any or either of the covenants contained in the indentures of lease of the —— day of ——, and the —— day of ——, respectively hereinbefore referred to, or either of them, and on the lessee's part to be observed and performed, touching or concerning the premises comprised in the indenture of assignment of even date herewith, executed by the said [*surviving executor*] to the said [*legatee*] as aforesaid, or of any other matter or thing in anywise relating thereunto. IN WITNESS, &c.

PECUNIARY LEGATEES TO EXECUTORS AND TRUSTEES.

RELEASE *and* COVENANT *of* INDEMNITY *by* LEGATEES *to* EXECUTORS *and* TRUSTEES *transferring a* PECUNIARY LEGACY *without deducting Legacy Duty, the Liability to which was doubtful.*

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*legatees*], of &c., of the one part; and [*executors*], of &c., of the other part: *(Recite will, whereby the sum of* 2000*l. was bequeathed to executors, In trust to invest the same in Government stock, and to pay the dividends to* [A.] *for life, and, after her decease, to transfer and divide the principal equally between her children living at her decease; Also the death of testator, and probate of his will)*: AND WHEREAS, in or about the month of March, 1814, the said [*executors*] accounted with the residuary legatees named in the said will for the balance or residue of the personal estate of the said testator, after paying and retaining the debts owing by him, and the pecuniary legacies bequeathed by his said will; and upon that occasion the said [*executors*] retained in their hands the said sum of 2000*l.* on account of the hereinbefore recited legacy; And the said [*executors*], out of the said legacy of 2000*l.*, paid to the receiver-general of his Majesty's stamp duties the legacy duty payable thereon, amounting to the sum of 160*l.*, being at the rate of 8*l. per cent.*, which was the rate of duty payable by legatees

Recite bequest to A. for life, and then to her children living at her decease.

Payment of legacy-duty according to the act then in force.

strangers in blood to the testator, according to the act then in force. And whereas the said [*executors*] invested the sum of 1840*l.*, the residue of the said legacy or sum of 2000*l.*, remaining in their hands after paying the legacy duty, in the purchase in their own names of 3440*l.* Three Pounds *per cent.* Consolidated Annuities. And whereas the said [*executors*] received the dividends arising from the said Consolidated Annuities, and paid the same from time to time as they accrued, to the said A. until her decease, which event took place in the month of March last. And whereas the said [*legatees*] are the only children of the said A. who survived her, and they have now called upon the said [*executors*] to transfer to and divide among them the said 3440*l.* Three Pounds *per cent.* Consolidated Annuities, pursuant to the trusts of the said recited will. And whereas the said [*executors*] are advised that doubts exist, whether, consistently with some recent decisions of the Court of Exchequer (*a*),

PECUNIARY LEGATEES TO EXECUTORS AND TRUSTEES.

Payment of dividends to legatee for life.

—That releasors are the only surviving children of deceased legatee for life.

—Question as to the legacy duty.

(*a*) The Court of Exchequer, in the case of *Attorney-General* v. *Wood*, 2 Younge & Jervis, 290, *ante*, p. 398, it will be remembered, decided that a legacy bequeathed to executors in trust, and retained and invested by them out of the residue so long ago as 1794, but which did not become divisible among the ulterior objects until 1826, was to be considered as retained and satisfied at the *latter* period, so as to become liable to the duty which in the meantime had been imposed by the stat. 55 Geo. 3, c. 184, *ante*, p. 370, on legacies retained and satisfied after the 31st of August, 1815. An important question growing out of the doctrine of this case is, whether it would apply, if, instead of the legacy having been retained before the creation of the duty, as in this instance, the retainer had occured since the stat. 36 Geo. 3, c. 52, and the executors on the occasion of such retainer had paid the duty imposed by that statute, or any subsequent act prior to that of the 55 Geo. 3, c. 184. According to the principle of the arguments of the Court of Exchequer, pushed to their full extent, it might seem that even in such a case it would still be incumbent on the executors to account for the higher duty which had become payable in the interval between the periods of the retention and the distribution of the fund; for, if a legacy is to be considered as undischarged for all the purposes of the duty while it remains *in* the hands of the executors, and *out of* the hands of the beneficial legatees, the only effect of the antecedent payment of duty would be to entitle the executors to receive credit for the amount so paid, in the ultimate payment; but, as this would involve the necessity of accounting for the legacy duty at two distinct pe-

Whether legacy which has paid the duty at the time of retainer, is liable to any further sum at distribution.

PECUNIARY LEGATEES TO EXECUTORS AND TRUSTEES.

they ought not to pay to his Majesty's Receiver-General such sum of money as would make up the difference between the legacy duty actually paid by them in the year 1814 as aforesaid, and the sum which, according to the act of Parliament now in force, regulating such duty, would have been payable on such legacy at the present time, if no such retainer thereof and payment of duty had taken place as aforesaid; but, as the said [*executors*] are of opinion, that it could not have been the intention of the Legislature that there should be two several and distinct periods for paying the legacy duty, they have consented to transfer the said 3440*l.* Three Pounds *per cent.* Consolidated Annuities to the said [*legatees*], on their entering into the covenant of indemnity hereinafter contained (*b*). NOW THIS INDENTURE WIT-

Testatum.

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riods, which is opposed to the general tenor of the acts, it is not likely that the point will be so determined. The Courts, in all probability, would rather venture to depart from the doctrine of the case of the *Attorney-General* v. *Wood*, at the cost of some violation of principle, or, (which would be still better), overrule the decision itself, than, in deference to its authority, to make an adjudication evidently contravening the intention of the Legislature. If the necessity of accounting for the duty at two distinct periods had been pointed out to the learned Barons, as a consequence of their construction of the recent act, probably they would have paused before they had adopted it; but that consequence is now only to be avoided by overturning the decision, or by raising a distinction in reference to the fact of duty having been paid at the time of the retainer, which is inconsistent with its reasoning, and subversive of its principle.

(*b*) Sometimes property is transferred to several specific legatees on their covenanting to answer latent debts, which the executors may be called upon to pay, in proportion to the value of their respective bequests. The following is a form of the recitals and covenant adapted to such a case. After reciting the agreement for the indemnity—

Variation where specific legatees covenant to answer debts in certain proportions.

"AND WHEREAS, for the purpose of ascertaining the amount of the money which the said [A. B.] and [C. D.] shall be respectively liable to pay under the covenants for that purpose hereinafter contained, it has been agreed that the value of the said sums of 2000*l.* Three Pounds *per cent.* Consolidated Annuities, so specifically bequeathed to the said [A. B.], and transferred to her by the said [*executors*], as hereinbefore mentioned, shall be considered and taken to be the sum of 1734*l.* 13*s.* 9*d.* sterling, and that the value of the said leasehold messuage so specifically bequeathed to

NESSETH, that, *(legatees acknowledge the transfer of the fund to them respectively in equal shares, and release the executors from all claims on account of the legacy, as in former precedents).* AND THIS INDENTURE FURTHER WITNESSETH, that, in pursuance of the hereinbefore recited agreement in that behalf, the said [*legatees*] do, for themselves, their heirs, executors, and administrators, jointly, and each of them doth for himself, his heirs, executors, and administrators, separately, covenant with the said [*executors*], their executors and administrators, that they the said [*legatees*], or some or one of them, or the heirs, executors, or administrators of some or one of them, shall and will at all times hereafter effectually save harmless and keep indemnified the said [*executors*] respectively, and

Release by legatees to executors.

Further *testatum.* Legatees covenant with executors to indemnify them by reason of the transfer of fund, without a further deduction of legacy duty.

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the said [C. D.], and assigned to him by the said [*executors*] as hereinbefore mentioned, shall be considered and taken to be the sum of £——, being the sums at which the same legacies were respectively valued by the Commissioners of Stamps, in order to ascertain the amount of the legacy duty payable thereon respectively. NOW THIS INDENTURE WITNESSETH, that, in pursuance and further performance of the said agreement, and in consideration of the premises, each of them the said [A. B.] and [C. D.] doth hereby for herself and himself, her and his heirs, executors, and administrators, covenant and agree with the said [*executors*], and their respective executors and administrators, that they, the said [A. B.] and [C. D.], respectively, and their respective executors or administrators, in proportion to the value (so fixed as aforesaid) of the legacies so specifically bequeathed to them the said [A. B.] and [C. D.], as hereinbefore mentioned, shall and will at any time or times hereafter, upon the request in writing of the personal representatives or representative for the time being of the said [*testator*], pay to them or him all such sum or sums of money as shall or may be required for paying, answering, or satisfying all the debts, claims, and demands, (if any), of, upon, or against the estate of the said [*testator*], which have not yet been ascertained to exist, and which the said estate shall be justly liable to pay, answer, or satisfy."

PECUNIARY LEGATEES TO EXECUTORS AND TRUSTEES.

their respective heirs, executors, and administrators, from and against all losses, costs, charges, damages, and expenses whatsoever, which they or he shall or may sustain, incur, or be put unto, by reason or in consequence of the said transfer to the said [*legatees*] of the said 3440*l.* Three Pounds *per cent.* Consolidated Annuities, without retaining or deducting and paying any sum on account of the legacy duty, other than and in addition to the said sum of 160*l.*, so paid by the said [*executors*] on account thereof as aforesaid, or for or by reason of any matter, cause, or thing in anywise relating thereunto. IN WITNESS, &c.

BY EXECUTOR AND LEGATEES IN TRUST OF COVENANTEE.

RELEASE *of a* COVENANT *to pay a Sum of Money by the* EXECUTOR *and* LEGATEES *in* TRUST *of the Covenantee, in Consideration of Transfer of Stock, and* DECLARATION *of* TRUST *thereof, (the Releasee being* Cestui que Trust *for Life, of the Stock.)*

TO ALL TO WHOM THESE PRESENTS SHALL COME, [*trustees*], of &c., and [*executor*], of &c., severally SEND GREETING; WHEREAS, by an indenture of six parts, bearing date on or about the —— day of ——, and made between [*covenantor*], of &c., of the first part; [*covenantee*], of &c., of the second part; and various other persons of the remaining parts; the said [*covenantor*] did for himself, his heirs, executors, and administrators, covenant with the said [*covenantee*], her executors, administrators, and assigns, that he the said [*covenantor*], his heirs, executors, or administrators, would pay or cause to be paid to the executors, administrators, or assigns, of the said [*covenantee*], the sum of 4000*l.* of lawful money of Great Britain, within six calendar months next after the day of the death of the said [*covenantee*], with interest for the same after the rate of 5*l. per cent.* to commence and be computed as and from the day of her death. AND WHEREAS the said [*covenantee*] duly made and published her last will and testament in writing, bearing date on or about the —— day of ——, And thereby, after

Recital of a deed of covenant for payment of a sum of money.

Recital of the will of the covenantee.

BY EXECUTOR AND LEGATEES IN TRUST OF COVENANTEE.

reciting or taking notice of the said covenant contained in the said indenture of the —— day of ——, for payment of the sum of 4000*l.* and interest, the said testatrix did give and bequeath the said sum of 4000*l.*, and the interest thereon, so covenanted to be paid by the said [*covenantor*] as aforesaid, unto the said [T.], [*one trustee*], (by mistake therein called [L. B.]), and the said [*other trustee*], their executors, and administrators, *Upon trust* that they, or the survivor of them, or the executors or administrators of such survivor, should lay out and invest the said sum of 4000*l.*, when received, at interest, in his or their name or names, either in or upon some or one of the Parliamentary stocks or funds of Great Britain, or upon real or other securities, with power to change, alter, and vary the same security or securities, and should from time to time, during the life of her nephew, the said [*covenantor*], permit and suffer the said [*covenantor*], and his assigns, to receive and take the dividends, interest, and income of the said sum of 4000*l.*, and the stocks, funds, and securities, in or upon which the same should be invested (*a*); And after the decease of the said [*covenantor*], then should stand possessed of the said sum of 4000*l.* and the said stocks, funds, and securities, upon and for such trusts, intents, and purposes as are therein declared concerning the same; And the said [*covenantee*] appointed [R. S.] to be the executor of her said will; and after the said sum of 4000*l.* and interest should be paid by the said [*covenantor*] to the trustees of her said will, then the testatrix appointed the said [*covenantor*] also to be an executor of her said will (*b*). AND

Recital of two codicils.

(*a*) Where the obligee or covenantee of a sum of money bequeaths to the obligor or covenantor a life interest in the debt, it is frequently intended that the principal shall not be raised during the life of the legatee; *but this ought always to be expressed*, for such an intention is not necessarily to be inferred from a mere gift of the interest, which gift it is clear would not exonerate the personal representatives of the obligee or covenantee from the duty of raising the principal on the maturity of the bond or covenant. In the present instance, indeed, the terms of the bequest shew that the testatrix had a distinct intention not to postpone the calling in of the money.

Bequest of interest of debt to the debtor, does not postpone the payment.

(*b*) This suspension of the debtor's executorship until the payment of the debt is obviously designed to prevent the legal discharge, which the appointment would otherwise effect. *Vide ante*, p. 401.

BY EXECUTOR AND LEGATEES IN TRUST OF COVENANTEE.

WHEREAS the said [*covenantee*] made and published two codicils to her said will, which said codicils did not affect the bequests contained in her said will of the said sum of 4000*l.* and interest, or the appointment of executors therein contained; And the said testatrix afterwards departed this life; and her said will and codicils have been duly proved by the said [R. S.] in the Prerogative Court of the Archbishop of Canterbury. AND WHEREAS the said [*trustees*] having required payment of the said sum of 4000*l.*, bequeathed to them by the will of the said [*covenantee*] as aforesaid, the said [*covenantor*], with the consent and approbation as well of the said [*executor*], as executor as aforesaid, as of the said [*trustees*], testified by their respectively executing these presents, did, on the —— day of ——, 18—, transfer, or cause to be transferred into the names of the said [*trustees*], 5753*l.* 11*s.* 4*d.*, Three Pounds *per cent.* Reduced Annuities, which, according to the average market price of stock on that day, was of the value of 4000*l.* sterling money of Great Britain, in lieu, satisfaction, and discharge of the said sum of 4000*l.* by the said recited indenture covenanted to be paid by the said [*covenantor*], to the executors, administrators, or assigns of the said [*covenantee*], and given and bequeathed as aforesaid, but without any interest for the same, such interest having, with the consent and approbation of the said [*trustees*] and [*executor*], been retained by the said [*covenantor*], by virtue of the hereinbefore recited bequest to him, as he doth hereby acknowledge, testify, and declare. NOW THESE PRESENTS WITNESS, that, in consideration of the said 5753*l.* 11*s.* 4*d.*, Three Pounds *per cent.* Reduced Annuities, so transferred by the said [*covenantor*] to them the said [*trustees*], in satisfaction and discharge of the said sum of 4000*l.* as aforesaid, which transfer they do hereby respectively acknowledge, testify, and declare, They, the said [*trustees*], by these presents *Do*, and each of them *Doth* release, exonerate, and discharge the said [*covenantor*], his heirs, executors, and administrators, of and from the said sum of 4000*l.*, by the said recited indenture covenanted to be paid as aforesaid, and so bequeathed to the said [*trustees*] by the will of the said [*covenantee*] as aforesaid, and of and from all actions, suits, and other proceedings, claims, and demands at law or in equity, which they, the said [*trustees*], or either of them, now have or hath, or may bring, com-

Recital of a transfer of stock, adequate in value to the sum covenanted to be paid.

And of the retention of interest.

Testatum.

In consideration of the transfer of the stock, trustees release the covenantor from the principal and interest, and all actions, &c., in respect thereof.

mence, or prosecute, or which they or either of them, their or either of their executors or administrators, at any time or times hereafter, can or may bring, commence, or prosecute, have, claim, challenge, or demand, upon or against the said [*covenantor*], his heirs, executors, or administrators, by reason or on account of the said sum of 4000*l.*, or any part thereof, or the interest thereon, or on any part thereof. BY EXECUTOR AND LEGATEES IN TRUST OF COVENANTEE.

AND THESE PRESENTS FURTHER WITNESS, that, in consideration of the said 5753*l.* 11*s.* 4*d.*, Three Pounds *per cent.* Reduced Annuities, so transferred into the names of the said [*trustees*] by the said [*covenantor*] as aforesaid, the transfer whereof the said [*executor*] doth hereby acknowledge, testify, and declare (*c*); he the said [*executor*], as executor as aforesaid, *Doth*, by these presents, remise, release, and for ever quit claim unto the said [*covenantor*], his heirs, executors, and administrators, the covenant contained in the said recited indenture of the —— day of ——, for payment of the sum of 4000*l.* and interest, as aforesaid; and all actions, suits, and other proceedings at law and in equity, claims and demands whatsoever, which the said [*executor*] now hath or may bring, commence, or prosecute, or which he, his executors or administrators, or the executors or administrators for the time being of the said [*covenantee*] deceased, can, shall, or may bring, commence, or prosecute, have, claim, challenge, or demand against or upon the said [*covenantor*], his heirs, executors, or administrators, for, or by reason, or on account of the said covenant, or the said principal sum of 4000*l.* thereby secured, or any part thereof, or the interest thereon. Second *testatum*. Release by the executor of the covenantor.

AND THESE PRESENTS FURTHER WITNESS, that the said [*trustees*] do hereby acknowledge, testify, and declare, that they, the said [*trustees*], with the consent and approbation of the said [*executor*], testified as aforesaid (*d*), and the survivor of Further *testatum*. Declaration of trust by trustees.

(*c*) Or, for the sake of brevity, instead of the preceding passage in the text, say—

"for the considerations aforesaid."

(*d*) The concurrence of the executor is necessary, not only for the purpose of releasing the covenant, but to consent to the monies covenanted to be paid going into the hands of the legatees in trust; which consent, of course he would not give unless he had sufficient assets from

BY EXECUTOR AND LEGATEES IN TRUST OF COVENANTEE.

them, and the executors, administrators, or assigns of such survivor, shall and will henceforth stand and be possessed and interested in the said 5753*l.* 11*s.* 4*d.*, Three Pounds *per cent.* Reduced Annuities, so transferred into and now standing in the names of the said [*trustees*] as aforesaid: *Upon trust*, to permit and suffer the said [*covenantor*] and his assigns to receive the dividends, interest, and annual proceeds from time to time arising therefrom, during the term of his natural life, for his and their own use and benefit, according to the tenor and effect of the hereinbefore recited bequest contained in the said will of the said [*covenantee*] deceased; And from and after the decease of the said [*covenantor*], then as to as well the said 5753*l.* 11*s.* 4*d.*, Three Pounds *per cent.* Reduced Annuities, as the dividends, interest, and annual proceeds thenceforth arising therefrom; *Upon the trusts*, and for the intents and purposes expressed and declared in and by the hereinbefore recited will concerning the said sum of 4000*l.* bequeathed by the said [*covenantee*] deceased, as aforesaid; And upon, to, or for no other trust, intent, or purpose whatsoever. IN WITNESS, &c.

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other sources for the payment of debts. If there was any risk of the money being wanted for this purpose, the trustees might enter into a declaration similar to that which is contained in a former precedent, that the stock should continue liable to answer the claims of the testator's creditors. (*Vide ante*, p. 465).

RELEASE *and* COVENANT *of* INDEMNITY *by the* Cestui que Trust *under a Marriage Settlement, on the Trustees' transferring a Mortgage Security, part of the* TRUST FUNDS, *to the Releasor* (*a*).

TO TRUSTEES ON THEIR TRANSFERRING A MORTGAGE TO THE CESTUI QUE TRUST.

THIS INDENTURE, made the —— day of ——, BETWEEN [*releasor*], of &c., of the one part; and [*releasees*], of &c., of the other part (*b*): WHEREAS, by indenture quadrupartite, bearing date on or about the —— day of ——, in the year ——, and made, or expressed to be made between [*father*], of &c., (since deceased), of the first part; [*mother*], of &c., (also deceased), of the second part; and [*trus-*

Recital of settlement made on the marriage of the deceased parents of the releasor.

(*a*) In such a case as the present, the release is useful not only with a view to its immediate and primary object in discharging the trustees, but in explaining the real nature of the transaction between the *cestui que trust* and the trustees, which is disguised on the face of the deeds transferring the securities, in order to avoid disclosing the trusts. The transfer of mortgage, it will be collected from the recitals of the present deed, was expressed to be for a consideration equal to the amount of principal and interest monies due on it—a usual, though not a necessary precaution, as the deed might have stated that the property belonged to the transferree, without detailing the nature of the trusts.

Remarks upon the precedent in the text.

(*b*) It is more usual to make releases by deed-poll than by indenture; but where the instrument contains a covenant on the part of the releasee, the Editor has generally adopted the latter form, not because a covenant cannot be introduced into a deed-poll, even by a person not named in the exordium, (since it is clear that a covenantor need not, though a covenantee must be a party to the deed of covenant, *vide ante*, p. 414,) but because the frame of an indenture appears to be better adapted to an instrument containing mutual stipulations. Indeed, it is often advisable to make a release containing important recitals by indenture rather than by deed-poll, on account of the greater solemnity of the instrument, or, in other words, of its peculiar operation as an estoppel.

Where releases should be made by indenture.

TO TRUSTEES ON THEIR TRANSFERRING A MORTGAGE TO THE CESTUI QUE TRUST.

tees], of &c., of the third part; (being the settlement made in contemplation of the marriage then intended and afterwards had between the said [*father*] and [*mother*], It was declared and agreed that the said [*trustees*] should stand possessed of the sum of 12,000*l.* therein mentioned, when the same should be paid to them, *In trust* to invest the same in the funds or on real securities, and to apply and dispose of the interest thereon as therein directed, during the joint lives of the said [*father*] and [*mother*], and the life of the survivor of them; and, after the decease of such survivor, *Upon trust* to assign, transfer, and absolutely dispose of the said sum of 12,000*l.*, and the stocks, funds, and securities, upon which the same or any part thereof should be invested, and to pay and dispose of the money arising by such sale or transfer, and the dividends, interest, and proceeds thereof, which should have accrued from the death of the survivor of them, the said [*father*] deceased, and [*mother*], until such sale or transfer, in the manner following, that is to say, In case there should be any child or children of the said [*father*] deceased by the said [*mother*], then to pay and dispose of the money which should arise by such sale or transfer, to or among such one or more of the said children, whether son or daughter, or to or among any such child or children, at such days and times, and in such parts, shares, and proportions, and subject to such conditions, restrictions, charges, and limitations over, as the said [*father*] deceased, and [*mother*], the daughter, during their joint lives, should at any time or times, by any deed or writing, with or without power of revocation, sealed and delivered by them in the presence of, and attested by two or more credible witnesses, direct or appoint. And whereas, by a deed poll or instrument in writing, duly sealed and delivered by the said [*father*] and [*mother*], his wife, now respectively deceased, in the presence of and attested by two or more credible witnesses, bearing date on or about the —— day of ——, in the year ——, they, the said [*father*] and [*mother*], his wife, in exercise of the power and authority in that behalf to them given and reserved, in and by their said marriage settlement as aforesaid, Did direct and appoint that the said sum of 12,000*l.* should, immediately after the death of the survivor of them, the said [*father*] and [*mother*], his wife, be paid

—Appointment in favour of the releasor.

to and become the property of the said [*releasor*], their eldest son, his executors, administrators, and assigns, to and for his and their own use and benefit. AND WHEREAS by a deed poll or instrument in writing, under the hands and seals of the said [*father*] and [*mother*], his wife, indorsed on the said hereinbefore in part recited indenture of settlement, and bearing date on or about the —— day of ——, 18—, they, the said [*father*] and [*mother*], his wife, in pursuance of a power in that behalf contained in the said settlement, did nominate and appoint the aforesaid [*releasees*] to be trustees in the place of the said [*trustees*], to execute the trusts in the same indenture of settlement. AND WHEREAS the said [*releasees*], having received the said sum of 12,000*l.* mentioned in the said indenture of settlement, placed out the sum of 10,000*l.*, part thereof, at interest on a mortgage in fee of certain estates in the county of ——, belonging to the Most Noble ——, late Duke of ——, which were conveyed to them by indentures of lease and release, bearing date the —— and —— days of ——, 18—. AND WHEREAS the said [*father*], deceased, survived the said [*mother*], his wife, and died on or about the —— day of ——, in the year ——, whereupon the said [*releasor*] became absolutely entitled to the said sum of 12,000*l.*, mentioned in the said indenture of settlement, under and by virtue of the said deed of appointment of the —— day of ——. AND WHEREAS all the interest accrued and become due since the decease of the said [*husband*], upon or for the said sum of 10,000*l.* so lent on mortgage as aforesaid, hath been duly paid to the said [*releasee*], up and home to the —— day of ——, last, as he doth hereby acknowledge; And by indentures of lease and release, and assignment, the release and assignment bearing even date with these presents, the said [*releasees*] have transferred, conveyed, and assigned the mortgage and the estates therein comprised, and the said sum of 10,000*l.* thereby secured, together with all interest due and to grow due for the same, unto the said [*releasor*], for and in consideration of the sum of 10,250*l.*, the amount of the principal and interest now due on the said mortgage, therein expressed to be paid by him to the said [*releasees*]. AND WHEREAS the said sum of 10,250*l.*, so expressed to be paid by the said [*releasor*] to the said [*releasees*], was not in fact paid by him to them; but such transfer, conveyance,

TO TRUSTEES ON THEIR TRANSFERRING A MORTGAGE TO THE CESTUI QUE TRUST.

—Appointment of new trustees.

—Of part of the trust money having been placed out on mortgage security.

—Of death of prior tenants for life.

—That interest has been duly paid on the mortgage, and the security transferred to the releasor.

—That expressed consideration was not in fact paid.

TO TRUSTEES ON THEIR TRANSFERRING A MORTGAGE TO THE CESTUI QUE TRUST.

and assignment as aforesaid, were made to him in consideration of his being entitled to the said sum of 10,000*l.* and interest secured by the said mortgage, by the ways and means hereinbefore mentioned. NOW THEREFORE THIS INDENTURE WITNESSETH, that, in consideration of such transfer, conveyance, and assignment as aforesaid, and of all and singular other the premises, he the said [*releasor*] *Doth* by these presents release, acquit, and discharge the said [*releasees*], and every of them, their and every of their heirs, executors, and administrators, and their and every of their lands, tenements, goods, and chattels, of and from the said sum of 10,000*l.*, (part of the said sum of 12,000*l.*), so lent by them on mortgage as aforesaid, and to which he the said [*releasor*] became entitled as hereinbefore is mentioned; And of and from all interest accrued or become due for the same since the death of the said [*father*], deceased; *And also* of and from all and all manner of action and actions, suit and suits, cause and causes of action and suit, debts, accounts, reckonings, controversies, damages, claims, and demands whatsoever, at law and in equity, which he the said [*releasor*] now hath or ever had, or which he, his executors or administrators could or might, if these presents had not been made, have had, claimed, or demanded from, upon, or against the said [*releasees*] or any of them, their or any of their heirs, executors, or administrators, for or on account of the said sum of 10,000*l.* so lent on mortgage as aforesaid, or any part thereof, or any interest for the same, or for or by reason or means, or on account of any act, transaction, matter, or thing whatsoever in any wise relating thereto. AND THIS INDENTURE FURTHER WITNESSETH, that, in consideration of the premises, the said [*releasor*] doth hereby for himself, his heirs, executors, and administrators, covenant and agree with the said [*releasees*], their executors, administrators, and assigns, that he the said [*releasor*], his heirs, executors, or administrators, shall and will from time to time, and at all times hereafter, effectually indemnify and save harmless them the said [*releasees*], and every of them, their and every of their executors and administrators, from and against all costs, damages, charges, and expenses whatsoever, on account or in consequence of any action or actions, or suit or suits, which shall or may hereafter

Testatum.

In consideration of the premises *cestui que trust* releases the trustees from principal and interest monies transferred to him, and all actions, &c., in respect thereof.

Further *testatum.*

Covenant of indemnity by the releasor with the releasees, in consequence of their names being used in actions.

be brought or prosecuted in their or any of their names or name by the said [*releasor*], his executors, administrators, or assigns, for the recovery of the said sum of 10,000*l.* and interest so assigned to him as aforesaid, or any part thereof, or in anywise relating thereto (*c*). IN WITNESS, &c.

TO TRUSTEES ON THEIR TRANSFERRING A MORTGAGE TO THE CESTUI QUE TRUST.

(*c*) This covenant is proper, though, even independently of express contract, the *cestui que trust* would be bound to indemnify the trustees against any risk which they may incur by their liability to the costs of actions brought by him in their names, under the power of attorney contained in the deed of transfer of mortgage. What trustees ought to do in cases such as the present, or in other instances where they are called upon to incur a liability of this nature, is a point often debated. Convenience certainly sometimes requires that they should permit the use of their names on having a personal indemnity; but if trustees are disposed to stand upon their strict legal privileges, it seems difficult to deny them the right of demanding to be discharged from every vestige of responsibility, before they relinquish their hold upon the trust property.

Remarks on the covenant of indemnity.

RELEASE *to a* TRUSTEE, *on having* SOLD *an* ESTATE, *pursuant to the Trusts; and having* DISTRIBUTED *the Money among the* Cestuis que Trust, *(who are numerous), the Wife of the Trustee being one of the* Cestuis que Trust. *And* COVENANT *to* INDEMNIFY *the Trustee.*

TO A TRUSTEE FOR SALE.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [cestuis que trust, *who are entitled to the trust monies in various proportions*], of the first, second, third, and fourth parts; and [*the trustee to whom the release is made*], of the fifth part. *(Recite indentures of lease and release creating the trust for sale, also the sale of the trust estate for the sum of* 1200*l.*, *and that the sum of* 1165*l*, *the balance or residue of the purchase-money, was now divisible under the trust).* AND WHEREAS the several persons, parties hereto, of the first, second, third, and fourth

Parties.

Recital that the *cestuis que trust*, having consider-

TO A TRUSTEE FOR SALE.

ed their respective interests, were entitled as follows:

parts, having examined and duly considered the nature and amount of their respective rights and interests, claims and demands, in respect of the said sum of 1165*l.* now remaining in the hands of the said [*trustee*], as the balance or residue of the price or consideration for the sum of the said hereditaments hereinbefore mentioned, have agreed, that the same sum of 1165*l.* shall be paid or divided among the several persons, and in the shares or proportions following, (that is to say), the sum of 125*l.*, part thereof, to the said [A. B.] and [C.], his wife; the sum of 80*l.*, other part thereof, to the said [D. E.] and [F.], his wife, *(and so on with respect to other sums);* and the sum of 350*l.*, the residue thereof, to the said [*trustee*] and [A.] his wife.

—That the trustee for sale had paid the said parties their shares.

And whereas the said [*trustee*], previously to the execution of these presents, in pursuance of the said lastly mentioned agreement, and with the privity, consent, and approbation of the said several persons, parties hereto, of the first, second, third, and fourth parts, testified by their severally executing these presents, hath paid the sum of 125*l.* to the said [A. B.] and [C.], his wife, which they do hereby respectively acknowledge; *(Recite also the payment of the other sums to the other legatees, in like manner).* And the said [*trustee*], in pursuance of the said recited agreement, and with the privity, consent, and approbation of the said several other persons, parties hereto, (testified as aforesaid), hath retained for his own use the sum of 350*l.*, being the remaining part of the said sum of 1165*l.* NOW THIS INDENTURE WITNESSETH, that they the said several persons, parties hereto, of the first, second, third, and fourth parts, do hereby respectively testify and declare their consent to and approbation of the said sale and conveyance so by the said [*trustee*] made, as hereinbefore mentioned, of the said hereditaments comprised in the hereinbefore recited indentures of lease and release as aforesaid; *And also*, their consent to and approbation of the appropriation so by him the said [*trustee*] made of the said purchase-money or sum of 1200*l.* as aforesaid; And in consideration of the said several sums of money hereinbefore mentioned to have been paid by the said [*trustee*], and of all and singular other the premises, they the said several persons, parties hereto, of the first, second, third, and fourth parts, *Do*, and every of them

Testatum.

Cestuis que trust testify their consent to the said sale.

And also their consent to the said payments.

And, in consideration of the said sums,

TO A TRUSTEE FOR SALE.

Doth remise, release, and for ever quit claim unto the said [*trustee*], his heirs, executors, and administrators, *All* and all manner of actions and suits, cause and causes of action and suit, controversies, differences, debts, duties, accounts, reckonings, sum and sums of money, and all other claims and demands whatsoever, both at law and in equity, which they the said several other persons, parties hereto, of the first, second, third, and fourth parts respectively, or any of them, now have or hath, or which they, any, or either of them, their, or any or either of their heirs, executors, or administrators, or any person or persons on their or any of their accounts, can, shall, or may have, claim, challenge, or demand upon or against the said [*trustee*], his heirs, executors, or administrators, for or by reason or on account of the several hereditaments and premises comprised in and released, or expressed to be released, by the said indenture of release of the —— day of ——, or the rents and profits thereof, or of any part thereof, or for, in respect, or by reason or on account of the sale and conveyance so made by the said [*trustee*], of the same hereditaments, as hereinbefore mentioned, or the said sum of 1200*l.*, the purchase-money for the same, or any part thereof, or for or by reason or on account of the payment or division of the sum of 1165*l.*, in manner aforesaid; or of the said [*trustees*] having retained the said sum of 350*l.* as aforesaid; or for, or by reason, or on account of any act, matter, or thing in anywise relating to the premises or any of them. AND THIS INDENTURE FURTHER WITNESSETH, that, in consideration of all and singular the premises, the said parties hereto, of the first, second, third, and fourth parts, (except such of the said parties as are under coverture), do hereby, for themselves jointly and severally, and for their respective heirs, executors, and administrators, covenant and agree with the said [*trustee*], his heirs, executors, and administrators, that they the said covenanting parties, or some or one of them, their, or some or one of their heirs, executors, or administrators, shall and will, from time to time and at all times hereafter, save, defend, and keep harmless and indemnified, the said [*trustee*], his heirs, executors, and administrators, and every of them, and his and their lands and tenements, goods and chattels, of, from, and against all actions, suits, and other proceed-

They release and for ever quit claim,

All actions, &c.

Further *testatum.*

Parties of the 1st, 2nd, 3rd, and 4th parts, (except married women), covenant to indemnify the trustee,

TO A TRUSTEE FOR SALE.

—from all actions.

ings, both at law and in equity, which can, shall, or may, at any time or times hereafter, be brought, had, commenced, or prosecuted against the said [*trustee*], his heirs, executors, or administrators; and of, from, and against all costs, charges, damages, and expenses, which he or they can, shall, or may bear, pay, sustain, expend, be at, or be put unto, for, by reason, or on account of the sale and conveyance so made by the said [*trustee*], of the said messuages, lands, tenements, and hereditaments comprised in the said recited indenture of release of the —— day of ——, as hereinbefore mentioned, or for, or by reason, or on account of the said [*trustee*] having received the said purchase-money or sum of 1200*l.*, or his having paid or applied the same, or any part thereof, in manner hereinbefore mentioned. IN WITNESS, &c.

RELEASE OF ANNUITY, AND SURRENDER OF TERM.

RELEASE *of* LANDS *from a* REDEEMABLE ANNUITY, *and* SURRENDER *of a* TERM *created for securing it* (*a*). *(By Indorsement on the Annuity Deed).*

Parties.

THIS INDENTURE, of three parts, made the —— day of ——, BETWEEN the within-named [*releasor*], of the first part; the within-named [*surrenderor*], of the second part; and the within-named [*releasee*], of the third part:

Recites that releasee is desirous to re-purchase annuity, and has paid all arrears.

WHEREAS the said [*releasee*] is desirous to redeem or re-purchase the annuity or yearly rent-charge of £——, granted and secured by the within indenture pursuant to the power therein contained, and hath given to the said [*releasee*] the requisite notice in writing in that behalf, and paid to him all arrears of the said annuity or yearly rent-charge, up to and until and inclusive of the day of the date

(*a*) Conveyances on the redemption or re-purchase of a redeemable annuity or rent-charge are expressly exempted, from the *ad valorem* duty imposed on conveyances on the sale of any property, by stat. 55 Geo. 3, c. 184, s. 31.

RELEASE OF ANNUITY AND SURRENDER OF TERM.

Testatum.

In consideration of redemption money, grantee releases to grantor.

of these presents, as he the said [*releasor*] doth hereby acknowledge. NOW THIS INDENTURE WITNESSETH, that, in consideration of the premises, and in consideration of the sum of £——, of lawful money of Great Britain and Ireland, to the said [*releasor*] in hand paid by the said [*releasee*], upon or immediately before the execution of these presents, (the receipt of which said sum of £——, in full payment and satisfaction of the price or consideration money for the redemption or repurchase of the aforesaid annuity or yearly rent-charge of £——, conformably to the proviso in that behalf in the within indenture contained, the said [*releasor*] doth hereby acknowledge, and from the same redemption or repurchase money doth acquit, release, and for ever absolutely discharge the said [*releasee*], his heirs, executors, administrators, and assigns), He the said [*releasor*] *Doth* by these presents release, acquit, exonerate, and for ever absolutely discharge the said [*releasee*], his heirs, executors, administrators, and assigns; *And also* all the messuages, farms, lands, tenements, and all and singular other the hereditaments by the within indenture charged with the aforesaid annuity or yearly rent-charge, or expressed and intended so to be, with their appurtenances, and all other the real estate, and also all the personal estate of the said [*releasee*] of and from the said annuity or yearly rent-charge of £——, granted and secured as aforesaid, and all arrears and future payments thereof, and of and from the powers and remedies by entry and distress, and perception of the rents and profits, or otherwise, by the within indenture given and reserved for the purpose of securing the regular payment of the same annuity or yearly rent-charge, and the covenant in the within indenture contained on the part of the said [*releasee*] for payment of the same annuity or yearly rent-charge, and of and from all actions, suits (*b*), costs, charges, damages, expenses, claims, and demands whatsoever, for or in respect of or on account of the said annuity or yearly rent-charge of £——, or any part thereof, or such arrears or future payments thereof as aforesaid, or any part thereof respectively,

(*b*) If the annuity is secured by a judgment, satisfaction should be entered.

RELEASE OF ANNUITY AND SURRENDER OF TERM.

or otherwise in relation thereto. And the said [*releasor*] doth hereby for himself, his heirs, executors, and administrators, covenant and declare with and to the said [*releasee*], his heirs, and assigns, that he the said [*releasor*] hath not at any time heretofore made, done, executed, or permitted any act, matter, or thing whatsoever, by means whereof he is prevented or incapacitated from releasing the said [*releasee*], his heirs, executors, administrators, and assigns, and his and their said real and personal estate, of and from the payment of the said annuity or yearly rent-charge of £——, in manner aforesaid, and according to the true intent and meaning of these presents, or by means whereof the said —— and hereditaments, by the within indenture charged therewith as aforesaid, or expressed so to be, or any part thereof, are or is impeached, charged, or prejudicially affected in any manner howsoever.

Covenant by releasor that he has done no act by means whereof he is prevented from releasing.

Further *testatum*.

AND THIS INDENTURE FURTHER WITNESSETH, that, in consideration of the premises, and also in consideration of the sum of 10*s*. of such lawful money as aforesaid, to the said [*trustee*] in hand paid by the said [*releasee*], upon or before the execution of these presents, (the receipt whereof is hereby acknowledged), he the said [*trustee*], at the request and by the direction and appointment of the said [*releasor*], (testified by his executing these presents), *Hath* assigned, surrendered, and yielded up (*c*), and by these presents *Doth* assign, &c., unto the said [*releasee*], his heirs and assigns, *All those* the messuages, farms, lands, tenements, hereditaments, and premises, by the within indenture demised to the said [*trustee*], his executors, administrators, and assigns, for the within mentioned term of —— years, Upon the trusts therein expressed, for further and better securing the aforesaid annuity or yearly rent-charge, with their appurtenances;

Trustee, by the direction of the releasor and releasee, surrenders.

Where the term should be kept on foot.

(*c*) It rarely happens that where a person pays off an incumbrance of his own creation, he keeps on foot the satisfied term limited for securing it: and the preservation of the term cannot be recommended unless the owner were about to sell or mortgage the property; in which case, (especially if the merger would have the effect of letting in dower or judgment debts, against which the term in the hands of a purchaser or mortgagee would afford protection), it would be advisable to vest the term in a trustee in trust to attend the inheritance. The precedent in the text would then be varied, *ut ante*, p. 324.

RELEASE OF ANNUITY AND SURRENDER OF TERM.

And all the estate, right, title, trust, interest, term of years now to come and unexpired, property, claim, and demand whatsoever at law and in equity of him the said [*trustee*], in, to, or out of the said —— and hereditaments hereby surrendered as aforesaid; *To the intent*, that the residue now to come and unexpired of the said term of —— years, created by the within indenture in the said —— and hereditaments, hereby surrendered as aforesaid, and all other the estate, term, and interest of the said [*trustee*] therein, may be merged and extinguished in the freehold and inheritance of the same premises. *(Covenant by trustee with surrenderee that he has not incumbered).* In witness, &c.

All the estate, &c.

To the intent that term may be merged.

RELEASE *and* Indemnity *by the* Members *of a* Friendly Society *to the Administratrix of a* Deceased Trustee, distributing *a* Fund *on its* Dissolution.

BY MEMBERS OF A FRIENDLY SOCIETY.

THIS INDENTURE, made the —— day of ——, Between the several persons whose names and seals are subscribed and affixed to these presents, (other than the person hereinafter named as the party of the second part), of the first part; and [*administratrix*], of &c., of the second part: Whereas, in or about the year ——, a society was formed and established at ——, (conformably to the provisions of an act of Parliament made and passed in the thirty-third year of the reign of his late Majesty, King George the Third, intituled—"An act for the encouragement and relief of Friendly Societies," for the purpose of raising a stock or fund *(state the object of the society)*, according to certain articles, rules, and regulations, intitled *(insert title)*, and duly inrolled at the General Quarter Sessions of the Peace for the said county of ——, holden by adjournment at ——, in the said county, on the —— day of ——. And whereas part of the money constituting the stock or fund of the said society was, on or about the —— day of ——, invested in the purchase of 300*l.* 3*l.* *per centum* Consolidated Annuities, in

Parties.

Recital of formation of society.

—Investment of fund in the name of deceased trustee.

BY MEMBERS OF A FRIENDLY SOCIETY.

the name of [*deceased trustee*], one of the members thereof. And whereas the said [*deceased trustee*] died in or about the year ——, having duly made and published his last will and testament in writing, bearing date the —— day of ——, and thereby appointed his brother [*executor*], his sole executor, and the said [*administratrix*] his residuary legatee; and the said [*executor*] duly proved the said will in the Court of the Archdeacon of ——. And whereas the said [*executor*] died in the year ——, having, by his last will and testament, bearing date the —— day of ——, appointed [*executors*] executors thereof, who have duly proved the same will in the Archdeaconry Court aforesaid. And whereas, in or about ——, the said society was dissolved and determined by and with the consent and agreement of the said several persons, parties hereto of the first part, they being then and now the only members of the said society, and the only persons entitled to any benefit therefrom or the funds thereof. And whereas the Governor and Company of the Bank of England (*a*) having refused to transfer the said Three Pounds *per centum* Consolidated Annuities, under the probates aforesaid, the said [*administratrix*], (upon the request of the said several persons parties hereto of the first part), lately applied for and obtained letters of administration of the estate and effects of the said [*deceased trustee*], deceased, with his said will annexed, from the Prerogative Court of the Archbishop of Canterbury; And the said [*administratrix*], at the like request of the said several persons, parties hereto of the first part, hath sold the said 300*l.* Three Pounds *per centum* Consolidated Annuities for the sum of £——, having previously received a dividend thereon amounting to the sum of £——, which two sums amount together to the sum of £——, and after deducting the sum of £—— therefrom for the expenses attending the said sale and the said administration, and also the costs and expenses attending the preparation and execution of these presents, the sum of £——, remained in the hands of the said [*administratrix*]. And whereas the said several persons, parties hereto of the first part,

—His will and death.

—Death of executor.

—Dissolution of society.

—Administration with the will annexed to the deceased trustee.

—Agreement to divide fund, and release and

(*a*) The much debated question, whether the Bank of England is entitled to withhold from an executor a transfer of stock specifically bequeathed to another, has lately been decided in favour of the executor. *Franklin* v. *Bank of England*, 9 Barn. & Cress. 156.

BY MEMBERS OF A FRIENDLY SOCIETY.

have agreed that the said sum of £—— shall be divided amongst them in the proportions mentioned in the schedule hereunder written, and have requested the said [*administratrix*] to pay the same accordingly, which she hath consented to do on being released and indemnified in manner hereinafter mentioned. AND WHEREAS the said [*administratrix*] hath this day paid to the said several persons, parties hereto of the first part, the several sums set against their respective names in the schedule hereunder written, in full for their respective shares of the said sum of £——, as they do hereby respectively acknowledge, testified by their respectively executing these presents. NOW THIS INDENTURE WITNESSETH, that, in consideration of the premises, they the said several persons, parties hereto of the first part, *Do*, and each and every of them *Doth*, by these presents, remise, release, and for ever discharge the said [*administratrix*], her executors and administrators, of and from the said 300*l.* Three Pounds *per centum* Consolidated Annuities, and the monies produced by the sale thereof, and all dividends and income thereof, and all actions, suits, accounts, reckonings, claims, and demands whatsoever of them the said several persons, parties hereto of the first part, and of each and every or any of them, and their respective executors and administrators, on account or in respect of the same, or of any matter, cause, or thing in anywise relating thereto. *And* the said several persons, parties hereto of the first part, do hereby jointly for themselves, their heirs, executors, and administrators, and each of them severally, separately, and apart from the others of them, doth hereby for himself, his heirs, executors, and administrators, covenant and agree with the said [*administratrix*], her executors, and administrators, That they the said several persons, parties hereto of the first part respectively, and their respective heirs, executors, or administrators, shall or will at his or their own costs and charges, from time to time and at all times hereafter, well and effectually save harmless and keep indemnified the said [*administratrix*], her executors and administrators, and her and their estate and effects, and the estate and effects of the said [*deceased trustee*], deceased, of, from, and against all and all manner of actions, suits, payments, losses, costs, charges, damages, claims, and demands whatsoever, which shall or may be commenced or prosecuted against, or paid,

indemnify administratrix.

—Payment of shares.

Testatum.

In consideration of premises, parties of the first part release administratrix.

Covenant to indemnify.

BY MEMBERS OF A FRIENDLY SOCIETY.

incurred, borne, sustained, or made by the said [*administratrix*], her executors or administrators, or any or either of them, by reason or on account of such sale and transfer of the said 300*l.* Three Pounds *per centum* Consolidated Annuities, and such payment and application of the produce thereof, or any part of the same respectively as aforesaid, or by reason or on account of any other cause, matter, or thing whatsoever, in anywise relating to the premises. IN WITNESS, &c.

SCHEDULE to which the preceding indenture refers.

ANNUITANT-DEVISEES TO A PURCHASER.

RELEASE *of Lands from two* ANNUITIES *created by* WILL, *one of which was* REVERSIONARY, *and the other was vested in one of the Releasors* IN TRUST *for the other; and also from* DOWER, *to a* PURCHASER *of* PART *of the Testator's Estate.* (VARIATION *where the Release is of a* GROSS SUM) (*a*).

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*trustee*], of &c., of the first part; [*cestui que trust*], of &c., of the second part; [*reversionary annuitant*], of &c., of the third part; and [*purchaser*], of &c., of the fourth part: WHEREAS [*testator*], late of ——, in and by his last will and testament in writing, bearing date on or about the —— day of ——, which was in the year of our Lord ——, duly executed and attested for the devise of freehold estates, (amongst divers bequests and legacies therein contained), gave to the said (*b*) [*trustee*], his executors and administra-

Recital of will devising annuities.

(*a*) If the release is simply of a gross sum, the only parties will be the legatee of the one part, and the purchaser of the other part.

(*b*) If the release is of a gross sum, say—

Variation where the release is of a gross sum.

"to the said [*legatee*] the sum of 300*l.*, to be payable at the expiration of one year from the time of his decease, with interest at the rate of 4*l. per cent. per annum* from such decease."

ANNUITANT-DEVISEES TO A PURCHASER.

tors, during the life of his the said testator's wife, [*cestui que trust*], an annuity of 300*l.*, commencing from the time of his decease, *In trust* to pay the same by equal quarterly payments to the said [*cestui que trust*], for her separate use as therein mentioned; And the said testator thereby also gave to the said [*reversionary annuitant*], by the description of *(description)*, an annuity for her life of 200*l.*, to commence from the time of the death of his said wife, and to be paid quarterly afterwards during the lifetime of the said [*reversionary annuitant*]; And after certain other devises and bequests therein contained, the said [*testator*] devised and bequeathed all the rest, residue, and remainder of his estate and estates, real and personal, whatsoever and wheresoever, charged with the payment of the said annuities (*c*) (*d*), to the said [*trustees for sale*], their heirs, executors, and administrators, In trust, with all convenient speed after his death to collect in, sell, and dispose of all his the said testator's said estate and estates, and to convert the same into money; And the said [*testator*] thereby declared, that the receipt of the said [*trustees*], their heirs, executors, administrators, and assigns, for the monies which should come to their hands, should effectually discharge the person or persons paying the same from seeing to the application thereof; And the said testator afterwards departed this life on the —— day of ——, without revoking or varying his said will, which soon after his decease was proved by the executors therein named in the proper ecclesiastical Court:

—Of lease and release, conveying the lands intended to be released to the releasee as purchaser.

And whereas, by indentures of lease and release, the lease bearing date the day before the date of the release, and the release bearing even date with these presents, and made or expressed to be made between the said [*trustees for sale*], of the first part; the said [*purchaser*], of the second part; and [*dower trustee*], of &c., (a trustee nominated by and on the behalf of the said [*purchaser*],) of the third part; in

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Variation.

(*c*) "legacy or sum of 300*l.*"

(*d*) This amounts to an *equitable* charge only, and therefore the doctrine governing rent-charges (*vide ante*, p. 419), which precludes the releasing of *part* of the lands, does not apply. Still it may be proper for the releasor to satisfy himself that the residue of the lands charged has not been dealt with in such a manner as to preclude him from recovering more than a proportion.

ANNUITANT-DEVISEES TO A PURCHASER.

consideration of the sum of £——, in the said indenture of release mentioned to be paid by the said [*purchaser*] to the said [*trustees for sale*], They the said [*trustees for sale*] did grant, bargain, sell, alien, release, and confirm unto the said [*purchaser*], and his heirs, ALL *(parcels)*, &c., with their and every of their appurtenances, (being part of the real estate lately belonging to the said [*testator*], deceased), *To hold* the same unto the said [*purchaser*] and his heirs, *(to the ordinary uses to prevent dower (e))*; AND WHEREAS, at the time of the execution of the said recited indentures of lease and release, *It was agreed* that the said (*f*) [*cestui que trust*] and [*reversionary annuitant*], should respectively release the said [*purchaser*], his heirs and assigns, and the said hereditaments and premises hereinbefore described, of and from the payment of the said two annuities (*g*) of 300*l.* and 200*l.*, in manner hereinafter mentioned (*h*). NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, [and in consideration of the sum of 10*s.* of lawful money of Great Britain and Ireland, paid by the said [*purchaser*] to the said [*trustee*] and [*cestui que trust*], at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged (*i*),] (*k*) he the said [*trustee*], (at the request and by the direction of the said [*cestui que trust*], testified by her executing these presents), and also the said [*cestui*

—Agreement for release of purchased estate from annuities.

Testatum.

For a nominal consideration, trustee and *cestui que trust* release the purchaser and the purchased hereditaments.

(*e*) There is no apparent reason why the annuitants should not have joined in this deed, as the annuities were devised by the same will which created the trust for sale, so that nearly the same recitals would have applied to both. Sometimes, for the sake of simplicity, and even of brevity, it is advisable to effect distinct objects of this kind by separate deeds.

(*f*) If the release is of a gross sum—

Variation where the release is of a gross sum.

"[*legatee*] should release" &c.

(*g*) "legacy."

(*h*) The suggestion made *ante*, p. 455, as to the legacy duty, applies to this precedent.

(*i*) The mention of the nominal consideration may be rejected as wholly unnecessary.

(*k*) If the release is of a gross sum by the beneficial legatee—

"he the said [*legatee*] by these presents *Doth* remise" &c.

que trust] *Have*, and each of them *Hath* remised, released, and discharged, and by these presents *Do*, and each of them *Doth* remise, release, and discharge the said [*purchaser*], his heirs, and assigns, and the said hereditaments, and all and singular other the premises, with their and every of their appurtenances comprised in the said hereinbefore in part recited indentures of lease and release, of and from the payment of the said (*l*) annuity or yearly sum of 300*l.*, so given and bequeathed to or in trust for her the said [*cestui que trust*] during her life, in and by the hereinbefore in part recited will of the said [*testator*] as aforesaid; And of and from all arrears thereof; And of and from all and all manner of action and actions, suit and suits, cause and causes of action and suit, claims, pretensions, and demands whatsoever for or on account thereof, or in anywise relating thereto; And of and from all dower and thirds at common law, and right and title of dower and thirds at common law, and all other claims and demands of her the said [*cestui que trust*], of, in, to, or out of the same hereditaments and premises, every or any part thereof (*m*). AND THIS IN-

ANNUITANT-DEVISEES TO A PURCHASER.

From payment of the annuity, and all arrears, and all actions, &c.

And from dower.

Further *testatum*.

(*l*) "legacy or sum of 300*l.*, so given and bequeathed to her the said [*legatee*] in and by the hereinbefore in part recited will of the said [*testator*] as aforesaid; And of and from all interest in respect thereof, and of and from all and all manner of actions," &c.

Variation where the release is of a gross sum.

(*m*) Some persons would add, from abundant caution, a proviso to the following effect:—

"PROVIDED ALWAYS, and it is hereby declared, that nothing herein contained shall discharge, prejudice, or affect any lien or claim which the said [*trustee*], as such trustee as aforesaid, or the said [*cestui que trust*], or either of them, now have or hath, or at any time or times hereafter shall or may have against any part or parts of the estate and effects of the said [*testator*], deceased, charged with the payment of the said annuity of 300*l.* in and by his said recited will, other than and except the said hereditaments hereinbefore released from the payment of the said annuity as aforesaid,

Variation where a restrictive proviso is added.

ANNUITANT-DEVISEES TO A PURCHASER.

For a nominal consideration, reversionary annuitant releases the purchaser and the purchased hereditaments,

DENTURE FURTHER WITNESSETH, that, in further pursuance of the said agreement, and in consideration of the sum of 10*s.* of lawful money aforesaid, paid by the said [*purchaser*] to the said [*reversionary annuitant*], at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, she the said [*reversionary annuitant*] *Hath* remised, released, and discharged, And by these presents *Doth* remise, release, and discharge the said [*purchaser*], his heirs and assigns, and the said hereditaments, and all and singular other the premises, with their and every of their appurtenances comprised in the said hereinbefore in part recited indentures of lease and release, of and from the payment of the said annuity or yearly sum of 200*l.*, given and bequeathed to her the said [*reversionary annuitant*] after the decease of the said [*cestui que trust*], during the life of her the said [*reversionary annuitant*], in and by the said hereinbefore in part recited will of the said [*testator*] as aforesaid; And of and from all and all manner of action and actions, suit and suits, cause and causes of action and suit, claims, pretensions, and demands whatsoever for or on account thereof, or in anywise relating thereto (*n*). IN WITNESS, &c.

from the reversionary annuity, and all actions, &c.

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any thing hereinbefore contained, or any rule of law or equity to the contrary notwithstanding."

This proviso, it is scarcely necessary to say, is useless; for the law is not so absurd as to hold that a man who releases part, thereby evinces an intention to discharge the whole, though this in another instance (*vide ante*, p. 419,) is the involuntary consequence of his act, under the operation of a technical principle of law.

(*n*) If so intended add a power similar to the former.

REMAINDER-MAN TO TENANT FOR LIFE, FOR WASTE.

RELEASE *of* ACTIONS *by* REMAINDER-MAN, *on account of* WASTE COMMITTED *by* TENANT *for* LIFE, *(who is the Releasor's Father), in cutting down Timber, &c.*

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*releasor*], of &c., of the one part, and [*releasee*], of &c., of the other part.

Recital of marriage settlement.

WHEREAS, by indentures of lease and release, bearing date respectively the —— and —— days of ——, the release being of five parts, and expressed to be made between [Sir A. B.], since deceased, and the said [*releasee*], (party hereto), by his then name and addition of [A. B., Esq.], eldest son and heir apparent of the said [Sir A. B.], deceased, of the first part; [C. D.], of &c., and [*wife*], his only child, by her then name and addition of [*wife by maiden name*], spinster, of the second part; [Sir E. F.], of &c., Bart., and [G. H.], of &c., of the third part; [J. K.], of &c., of the fourth part; and [L. M.], of &c., of the fifth part; (being the settlement made previously to the marriage then intended to be, and afterwards duly solemnized between the said [*releasee*], (party hereto, then [A. B.]), and the said [*wife*]), the manor or lordship, or reputed manor or lordship, of ——, in the said county of ——, and divers messuages, farms, lands, and hereditaments in the parishes of ——, in the same county (*a*), were conveyed and assured *To the use* of the said [A. B.], (deceased), and his heirs, until the said then intended marriage should be solemnized; and, after the solemnization thereof, *To the use* of the said [J. K.], his executors, administrators, and assigns, for the term of ninety-nine years, to be computed from the solemnization thereof, (upon certain trusts therein mentioned, for securing

(*a*) It would not be necessary, in such a case, to state the parcels at length, which are, probably, long.

REMAINDERMAN TO TENANT FOR LIFE, FOR WASTE.

to the said [*releasee*], (party hereto, then [A. B.]), and, in the event of his death, to the said [*wife*], during the life of the said [Sir A. B.], (deceased), an annuity or yearly sum of 600*l.*); and, after the determination of the said term of ninety-nine years, and in the mean time subject thereto, and to the trusts thereof, *To the use* of the said [Sir A. B.], (deceased), and his assigns, for his natural life; *Remainder To the use* of the said [L. M.], his executors, administrators, or assigns, for the term of five hundred years, to be computed from the decease of the said [Sir A. B.], (deceased), Upon trust, (among other trusts which have since been satisfied or become unnecessary), for raising, after the decease of the said [Sir A. B.], (party hereto, then [A. B.]), other sum or sums therein mentioned, for the portions of the younger children of the said [Sir A. B.], (party hereto, then [A B.]), and Dame [*wife*], his wife; And after the determination of the said term of five hundred years, and in the mean time subject thereto, and to the trusts thereof, *To the use* of the said [Sir A. B.], (party hereto, then [A. B.]), and his assigns, for the term of his natural life, with a limitation to the use of the said [Sir E. F.] and [G. H.], and their heirs, during the life of the said [Sir A. B.], (party hereto, then [A. B.]), Upon trust, to support contingent remainders; *Remainder To the use* of the first son of the body of the said [Sir A. B.], (party hereto, then [A. B.]), on the body of the said [*wife*], his then intended wife, to be begotten; And to the heirs male of such first son issuing, with divers remainders over.

—That releasor is the only son of the marriage.

And whereas the said [*releasor*] is the first and only son of the said [*releasee*], (party hereto), and Dame [*wife*], his wife; and he attained the age of twenty-one years on or about the —— day of —— now last past.

—Common recovery suffered for barring the entail.

And whereas, by indentures of lease and release, the release being expressed to be made between the said [*releasee*], of the first part; the said [*releasor*], of the second part; [*tenant*], of &c., of the third part; and [*demandant*], of &c., of the fourth part; and by means of a common recovery, duly suffered in pursuance of an agreement for that purpose contained in the said indenture of release, and a declaration of the uses of the said recovery, also contained in the same indenture of release, the manors, advowsons, messuages, farms, lands, tenements, and other hereditaments hereinbefore mentioned, and comprised

in the said indentures of lease and release hereinbefore recited, have been and are intended to be discharged of all estates tail, and all reversions and remainders thereupon expectant or depending, and assured or limited to the use of the said [*releasee*], (party hereto), and his assigns, for the term of his natural life, with remainder to the use of the said [*releasor*], and of his heirs and assigns, for ever. AND WHEREAS the said [*releasee*], (party hereto), did, some time since, with the privity and consent of the said [*releasor*], his son, fell and cut down considerable quantities of timber and other trees, standing and being in or upon the lands and hereditaments comprised in the said recited indentures of lease and release, and sold and disposed of the same, and applied the produce thereof to or for his own use. AND WHEREAS, for the purpose of discharging the said [*releasee*], (party hereto), from all actions, claims, and demands whatsoever, for or in respect of the timber and other trees so felled and cut down by him as aforesaid, and the produce thereof, the said [*releasor*] hath determined and agreed to execute the release hereinafter contained. NOW THIS INDENTURE WITNESSETH, that, in pursuance of, and for effectuating the said agreement, and in consideration of the natural love and affection which the said [*releasor*] hath and beareth for and towards the said [*releasee*], (party hereto), his father, he the said [*releasor*], for himself, his heirs, executors, and administrators, *Doth* by these presents fully and absolutely remise, release, and for ever quit claim the said [*releasee*], (party hereto), his executors, administrators, and assigns, and his, their, and every of their estate and effects whatsoever, of and from all and all manner of forfeitures, action and actions, suit and suits, cause and causes of action and suit, accounts, reckonings, claims, and demands whatsoever, at law and in equity, or otherwise howsoever, for or by reason or on account of his, the said [*releasee*], (party hereto), having felled and cut down, sold, and disposed of such timber and trees, or any part thereof, or for or by reason or on account of any matter, cause, or thing in anywise relating to the premises. IN WITNESS, &c.

REMAINDERMAN TO TENANT FOR LIFE, FOR WASTE.

—Of waste committed by the releasee, the tenant for life.

—Agreement for release.

Testatum.

Remainderman, in consideration of natural love and affection, releases to tenant for life, all forfeitures, actions, &c.

COVENANT BY OWNER OF RENT-CHARGE NOT TO DISTRAIN OR ENTER.

COVENANT *by the* JOINTRESS-OWNER *of a* RENT-CHARGE, *with the* PURCHASER *of part of the Lands, not to* DISTRAIN *or* ENTER (*a*).

THIS INDENTURE, made the —— day of ——, 18—,

Parties.

BETWEEN [*jointress*], of &c., of the first part; [*vendor*], of &c., of the second part; and [*purchaser*], of &c., of the third part.

Recital of deed, creating the jointure rent-charge.

(Recite indentures of lease and release, by way of marriage settlement, by which lands were conveyed to the use of A. for life, with remainder, to the intent that the covenantor (the wife) should receive a yearly rent-charge of 300*l. during her life, with powers of distress and entry, with remainders over; reciting also the solemnization of the marriage, and the death of A., and that the persons entitled to the lands subject to the rent-charge had sold part of the estate to the covenantee; and that, by indentures of lease and release, the release of even date, the property in question had been conveyed for an estate in fee-simple to the covenantee).*

—Of preliminary agreement to covenant, as after mentioned.

AND WHEREAS the said [*jointress*] hath, upon the application and request of the

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Remarks upon the precedent in the text.

(*a*) A release of part of the lands, out of which a rent-charge issues, has the effect of extinguishing the rent, (*vide ante*, p. 419); and therefore, where it is intended to exonerate part only of the lands, the utmost that the rent-owner can do, consistently with the preservation of his claim on the remainder of the lands, is to give the purchaser a covenant not to distrain or enter on his portion of the lands; the breach of which would subject him (the covenantor) to an action for damages. If it did more, *i. e.*, if it operated as an absolute bar to the distress and entry, it would be attended with the consequence of extinguishing the rent, in the same manner as an instrument formally and technically framed as a release. The effect of the covenant being merely to entitle the covenantee to damages, in case of a distress or entry being made, it would be equally efficient, and perhaps more correct, if framed simply as a covenant for indemnity, according to the variation introduced in the following note.

said [*vendor*], (testified by his sealing and delivering these presents), agreed not to distrain or enter upon the said —— and hereditaments purchased by and conveyed to the said [*purchaser*] as aforesaid, with their appurtenances, for the purpose of enforcing the payment and recovery of the said annual sum of 300*l.*, being satisfied that the other hereditaments charged therewith are an ample security for the same. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, the said [*jointress*] Doth, for herself and her heirs, executors, administrators, and assigns, covenant and agree with the said [*purchaser*], his heirs and assigns, in manner following, that is to say (*b*), that she the said [*jointress*], her executors, administrators, or assigns, shall not nor will, at any time hereafter, in case of non-payment of the said annual sum of 300*l.*, or any part thereof, distrain or enter on, or cause or procure any distress or entry to be made on, the said manor and other hereditaments of and in —— aforesaid, or any of them, or any part or parts thereof; or bring, commence, carry on, or prosecute any action or actions, suit or suits, or other proceeding or proceedings against the tenants or occupiers for the

COVENANT BY OWNER OF RENT-CHARGE NOT TO DISTRAIN OR ENTER.

Testatum.

Jointress covenants not to distrain or enter on the lands of the purchaser.

(*b*) If the covenant is a covenant for indemnity only, as suggested *ante*, p. 504, proceed as follows:—

"that she, the said [*jointress*], her heirs, executors, and administrators, will, from time to time and at all times hereafter, effectually save harmless and keep indemnified the said [*purchaser*], his appointees, heirs, or assigns, or other the owners or occupiers for the time being of the said —— and other hereditaments conveyed and assured to the said [*purchaser*], as hereinbefore recited, from and against all losses, costs, charges, damages, and expenses whatsoever, which he or they shall or may incur or be put unto by reason or on account of any distress or entry being levied or made in or upon the said hereditaments or any part thereof, or any other proceeding or proceedings, either at law or in equity, being had or taken to enforce or compel the payment of the said annual sum of 300*l.* so limited to the said [*jointress*] during her life, as hereinbefore recited, or in anywise in relation thereunto. IN WITNESS," &c.

Variation where the covenant is framed as a covenant for indemnity.

COVENANT BY OWNER OF RENT-CHARGE NOT TO DISTRAIN OR ENTER.

time being, of the same manor and other hereditaments, or any of them, or any part or parcel thereof, for recovering, obtaining, or compelling payment of the said annual sum of 300*l.*, or any part thereof, or the rents and profits of the said manor and other hereditaments, or any part or parcel thereof, or anywise molest, interrupt, or disturb the said [*purchaser*], his heirs or assigns, or his or their under-tenants, in the possession or enjoyment of the said manor and other hereditaments, or any of them, or any part or parcel thereof, or in the perception of the rents, issues, and profits thereof; And that she the said [*jointress*] hath not, at any time heretofore, made, done, committed, or executed, or knowingly or willingly suffered any act, deed, matter, or thing whatsoever, whereby or by means whereof any person or persons other than the said [*jointress*] shall be enabled to distrain and enter on the said manor and other hereditaments to which the covenant hereinbefore contained extends. IN WITNESS, &c. (*c*).

Also that she has not incumbered.

(*c*) In the draft from which the precedent in the text was taken, a proviso was inserted, declaring that nothing therein contained should prejudice the jointress's claim upon the rest of the property; but it was omitted, because it appeared not to be framed consistently with sound principles of law; for it assumes two false positions—*first*, that the covenant operates as a release of the annuity; and *secondly*, that, being such, a proviso of this nature would prevent it from discharging the residue, or, to speak more accurately, from extinguishing the rent. The contrary, it is well known, is in both instances the fact.

OF COVENANTS FOR TITLE.

RELEASE *of* ACTIONS *for* BREACH *of* COVENANTS *for Title, and also of the* COVENANTS *themselves, by the* DEVISEES *of the deceased Purchaser, to the* VENDOR.

Recital of deeds of conveyance.

TO ALL TO WHOM THESE PRESENTS SHALL COME, [*devisee*], of &c., SENDS GREETING: WHEREAS, by indentures of lease and release, bearing date respectively the —— and —— days of ——, the release being made between [*various persons of the first, second, third, and fourth parts*]; [*vendor*], of &c., of the fifth part; [*purchaser*], of &c., of the sixth part; and [*dower trustee*], of &c., of the seventh part; in consideration of the sum of 1000*l.* paid by the said [*purchaser*] to the said [*vendor*] as and for the consideration for the absolute purchase of the hereditaments thereinafter mentioned, and the inheritance in fee-simple thereof, free from all incumbrances, the said [*vendor*] did grant, release, and convey, or otherwise assure, unto the said [*purchaser*], his heirs and assigns, for ever, ALL THAT *(describe parcels)*, To hold the same unto the said [*purchaser*], his heirs and assigns, for ever, To certain uses, unto or otherwise for the benefit of the said [*purchaser*], his appointees, heirs, and assigns, for ever; And in and by the said indenture of release, the said [*vendor*], for himself, his heirs, executors, and administrators, did covenant and agree with the said [*purchaser*], his heirs and assigns, that he the said [*vendor*] then had good right, full power, and lawful and absolute authority, to grant, release, and convey, or otherwise assure the said —— hereditaments, and premises thereby released, or intended so to be, unto the said [*purchaser*], his heirs and assigns, for ever, to the uses and in the manner thereinbefore expressed, according to the true intent and meaning of the said indenture (*a*). *(Recite any other co-*

(*a*) If the deed containing the covenants which are to be released is retained by the releasor, a memorandum of the release ought to be in-

OF COVENANTS FOR TITLE.

—Will of purchaser devising lands to the releasor.

venants to which the release is intended to extend). AND WHEREAS the said [*purchaser*], by his last will and testament in writing, bearing date on or about the —— day of ——, duly executed and attested for the devise of freehold estates, devised all and singular the said lands and hereditaments, by the description of All that his, the testator's, —— estate, consisting of ——, situate in the parish of ——, in the county of ——, with the appurtenances, to such uses, and for such estates as the said [*devisee*] should, by any deed or deeds duly executed, appoint (*b*); And in default of such appointment, to the use of the said [*devisee*], his heirs and assigns, for ever (*c*). AND WHEREAS the said testator depart-

—Death of testator.

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dorsed thereon, in order to prevent the deed from falling into the hands of a purchaser uninformed of the fact of the vendor's liability under the covenants having been discharged. Indeed, the release might often conveniently be indorsed on the purchase-deed containing the covenants.

As to devising to uses to prevent dower.

(*b*) The practice of devising to uses to prevent dower, which the Editor has more than once urged upon the adoption of the Profession, is now recommended by the additional consideration, that it enables the devisee, by means of his power of appointment, to vest the land in a purchaser or mortgagee exempt from liability to judgment debts, (*vide ante*, Vol. 7, p. 382); and therefore, even supposing that the measure now pending in Parliament for abolishing fines and recoveries should be eventually carried into effect (in spite of the difficulties of a fiscal nature which are understood to impede its progress), sufficient reason would still remain for the preference of this mode of limitation to that of a simple devise in fee.

By whom actions on covenants for title should be brought.

(*c*) As covenants for title run with the land, actions for the breach of them should be brought, and releases of such covenants or such actions should be made, by the *real* representatives of deceased covenantees, in whom the land is vested, and not by the personal representatives, although the cause of action may have originally accrued in the lifetime of the covenantee, provided the land be still affected by the breach. *Kingdon* v. *Nottle*, 1 Mau. & Selw. 355; 4 Id. 53; *King* v. *Jones*, 1 Marsh. 107; *S. C.* 5 Taunt. 418. But if the deceased covenantee has been actually evicted in his lifetime, the right of action devolves to his personal representatives, as the real subject, to which in the former case such right is annexed, is gone, leaving nothing in the covenantee but a claim to damages, which of course is personal. Thus, where an action was brought by the executor of a vendee of lands for a breach of a covenant for quiet enjoyment entered into with the testator, his heirs and assigns, and the defendant contended that the action ought to

ed this life on the —— day of ——, without having revoked or altered the hereinbefore recited devise contained in his said will; which said will, soon after his decease, was duly proved by the executor therein named, in the Prerogative Court of the Archbishop of Canterbury. And whereas the said [*devisee*] lately contracted for the sale of the said lands and premises devised to him as aforesaid; and on the occasion of such sale the title of the said hereditaments was in-

OF COVENANTS FOR TITLE.

—That devisee had contracted for the sale of the lands.

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have been brought by the heirs or assigns who had sustained the damage, and not by the executor; it was ruled by the Court, that the testator having been evicted, he could have no heir or assign of this land, but the damages should be recovered by the executor, although executors were not named in the covenant, for he *represents the person of the testator. Lucy* v. *Levington*, 2 Lev. 26.

To whom damages recovered by a tenant for life belong.

Where a tenant for life recovers damages for a breach of covenant affecting the land, damages so recovered are his absolute property, and no part of them belongs to the remainder man. Thus, where an estate had been devised to trustees for the life of A., and after her decease to the use of her children living at her death, and the trustees brought an action against a person to whom the testatrix had granted a lease of the premises for dilapidations, and obtained a verdict for 500*l.*, which the trustees invested in the public funds. After the death of A. the children claimed the capital of this fund, but it was held to belong to her administratrix. Sir *L. Shadwell*, V. C., said, that it had been urged in the argument, that the damages were something accruing to the inheritance; but no authority had been produced to shew that a Court of equity had ever held that damages were any thing but the personal estate of the person who recovered them; and that he should be introducing a new equity, if he were to hold that damages recovered in an action for a breach of a covenant running with the land, were to be considered as part of the inheritance. *Noble* v. *Cass*, 2 Sim. 343.

Remarks upon *Noble* v. *Cass*.

In order to sustain the doctrine contended for by the plaintiff in *Noble* v. *Cass*, it should have been made out that the tenant for life bringing an action for an injury done to the land represented the inheritance, in regard to his claim to damages; whereas it is conceived the fact is clearly otherwise, for the damages recovered by him, if the breach of covenant affected the entire inheritance, would be proportioned to the extent of his estate only, and the defendant would be liable to another action at the suit of the remainder-man for his share of the injury. Considered in this point of view, the soundness of the decision of the Vice-Chancellor is apparent.

OF COVENANTS FOR TITLE.

vestigated, when it appeared that the said [*vendor*] had not, at the time of his hereinbefore recited sale and conveyance, a clear and unimpeachable title to the inheritance in fee-simple thereof, pursuant to his covenant in that behalf hereinbefore recited; but that an estate tail, supposed to have been barred by a common recovery suffered many years since, still remained in force, in consequence of the person in whom the immediate freehold was vested at the time not having concurred in the conveyance to the tenant to the *præcipe*.

—Agreement for compromise.

AND WHEREAS, after much negotiation and treaty between the said [*vendor*] and [*devisee*], it has been finally agreed between them, that, in consideration of the sum of 600*l.* being paid by the said [*vendor*] to the said [*devisee*], he the said [*devisee*] should execute the release hereinafter contained (*d*).

Testatum.

NOW THIS INDENTURE WITNESS-

As to recitals in releases.

(*d*) In preparing releases which are intended to be general, care should be taken to avoid any recitals which by possibility might have the effect of narrowing the operation of the instrument. Thus, a recital, giving a summary of the intended objects of the deed, ought to be framed in exact coincidence with the language of the *testatum* clause, or, (which is commonly the safer plan), should, as in this instance, simply refer to it as explanatory of the import of the instrument.

Extent of the release should be clearly stated.

Where a release is executed on a sum of money being paid by way of compensation for an actual breach of covenant, if the nature of the covenant admit of several distinct and successive acts of non-performance, it ought to be explicitly stated whether the release is to be confined to the existing cause of action, or is to extend to the covenant itself. The former would be the construction if the release were of all claims and demands generally, and not of covenants expressly. (*Vide ante*, p. 420). Thus, if a covenant for further assurance has been broken by the refusal or neglect of the covenantor to execute any particular conveyance, a release by the covenantee of all demands would only apply to the previous breach, and not to any future breach occasioned by a repeated act of refusal or neglect.

The covenant as to the grantor's right to convey is open to somewhat different reasoning; for the breach necessarily occurs (if at all) at the instant that it is entered into, as the covenantor stipulates for his *present* capacity to convey the fee-simple; so that although, upon the discovery of a defect of title, the covenant may be then for the first time *known* to have been broken, yet the breach itself must have been instantaneous on its execution. There can be no doubt, however, that even in this case, if the

Devisee, in consideration of 600*l.*, releases to vendor the covenant, and all actions, &c.

ETH, that, in pursuance of the said agreement, and in consideration of the sum of 600*l.*, of lawful money of Great Britain and Ireland, paid by the said [*vendor*] to the said [*devisee*], at or immediately before the execution of these presents, the receipt of which said sum the said [*devisee*] doth hereby acknowledge, and therefrom doth absolutely acquit and discharge the said [*vendor*], his heirs, executors, and administrators, he the said [*devisee*] *Doth* for himself, his heirs, executors, administrators, and assigns, by these presents absolutely remise, release, and for ever quit claim unto the said [*vendor*], his heirs, executors, and administrators, the hereinbefore recited covenant and agreement entered into by the said [*vendor*] with the said [*purchaser*], in and by the hereinbefore in part recited indenture of release, and all other covenants and agreements of the said [*vendor*] therein contained, *And also* all and all manner of actions, suits, cause and causes of action and suit, debts, duties, sum and sums of money, reckonings, accounts, claims, and demands whatsoever, at law and in equity, which he the said [*devisee*] now hath, or which he, his heirs, executors, or administrators, can, shall, or may at any time or times hereafter, have, claim, challenge, or demand upon or against the said [*vendor*], his heirs, executors, or administrators, for or by reason or on account of the same covenants and agreements, or any breach or default already committed or made, or which shall or may hereafter be committed and made therein, or for or by reason or means of any act, matter, or thing, in anywise relating thereto. IN WITNESS, &c.

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release were evidently designed to discharge any specific ascertained breach, and not to apply to the general liability under the covenant, it would receive a restricted construction accordingly, the intention, as collected from the entire instrument, being, according to the universal and invariable rule, the sole governing principle of construction.

COVENANT TO PAY BY INSTALMENTS.

DEED *of* COMPOSITION (*a*) *by which the* DEBTOR *covenants to pay his* DEBTS *in full, but without Interest, by certain* INSTALMENTS, *and the* CREDITORS COVENANT *not to* SUE *him in the* MEANTIME.

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*debtor*], of &c., of the first part; and the several other persons whose names and seals are hereunto subscribed and affixed, (being creditors of the said [*debtor*],) of the

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Remarks upon composition deeds in general.

(*a*) Composition deeds may be principally divided into three classes: *First*, those in which the debtor, or some third person on his behalf, agrees to pay the debts, or a dividend on them, by certain instalments; in consideration of which the creditors either immediately release the debtor, or covenant to execute to him such release when the instalments are paid, and in the meantime to suspend the prosecution of their remedies against him. *Secondly*, those in which the debtor is allowed to wind up his affairs and divide the produce of his property among his creditors, under the inspection and superintendence of inspectors. The *third* and last class comprises those in which a debtor makes a general conveyance of all his property, in trust for the creditors. The first of these species of instruments (of which the precedent in the text affords an example) amounts simply to a postponement or partial abandonment by the creditors of their claims. The two last provide for the application of the whole property in liquidation of the debts, but differ in their mode of effecting it. A deed of inspectorship treats the debtor as a man still to be intrusted with the management of his concerns, subject to the superintendence of others; but a general conveyance of his effects wrests all management and power entirely out of his hands, approaching in its consequences more nearly to a commission of bankrupt, which indeed may follow from the execution of the deed itself, it being an act of bankruptcy. On account of this inconvenient result, and because it seems generally to be thought that the affairs of a man can be more advantageously wound up by himself than by others, (assuming, of course, that he has not forfeited the confidence of his creditors), deeds of inspectorship are oftener resorted to than conveyances in trust for creditors.

second part: WHEREAS the said [*debtor*] is indebted to the said parties hereto of the second part in the several sums of money set opposite to their respective names hereunto subscribed, and being unable at present to discharge the same debts, hath proposed to his said creditors an arrangement for the gradual liquidation thereof by the immediate payment to each of the said creditors of one equal fourth part of the amount of their respective debts, and by payment of the residue of such debts by instalments without interest, at the respective times and in manner hereinafter expressed; And the said parties hereto of the second part have consented to accede to the said arrangement, and to enter into the covenant and agreement on their respective parts hereinafter contained. NOW THIS INDENTURE WITNESSETH, that, in consideration of the premises, the said [*debtor*] doth hereby for himself, his heirs, executors, and administrators, covenant and agree with the said several parties hereto of the second part respectively, and their respective executors and administrators, in manner following, that is to say that he the said [*debtor*] will, on the day of the execution of these presents, pay or cause to be paid to them the said parties hereto of the second part respectively, or their respective executors, administrators, or assigns, one equal fourth part of the amount of their said respective debts, and will, on or before the —— day of —— next ensuing the date of these presents, pay or cause to be paid to them the said parties hereto of the second part respectively, or their respective executors, administrators, or assigns, one other equal fourth part of the amount of their said respective debts; and will, on or before the —— day of ——, which will be in the year of our Lord ——, pay, or cause to be paid, to each of them the said parties hereto of the second part respectively, or their respective executors, administrators, or assigns, the two remaining equal fourth parts of their said respective debts, being, with the aforesaid previous payments, the full amount thereof respectively; the said several instalments to be respectively paid without any interest for the same, and without any deduction for taxes or otherwise. AND THIS INDENTURE FURTHER WITNESSETH, that, in consideration of the covenant hereinbefore contained on the part of the said [*debtor*] as

COVENANT TO PAY BY INSTALMENTS.

Recitals.

Testatum.

Debtor covenants to pay debts by instalments.

Further *testatum.*

Creditors covenant to accept

COVENANT TO PAY BY INSTALMENTS.

aforesaid, They the said parties hereto of the second part, do hereby for themselves respectively, and their respective heirs, executors, and administrators, covenant and agree with the said [*debtor*], his executors and administrators, that they the parties hereto of the second part respectively, will accept and take the said instalments hereinbefore covenanted to be paid by the said [*debtor*], in full satisfaction of their said several debts, and all interest thereon respectively, and will give to the said [*debtor*] proper receipts and acquittances for the same; And, when the whole of the said several instalments shall have been satisfied, shall and will, on the request and at the costs of the said [*debtor*], his executors or administrators, execute to him or them a general release of all claims and demands whatsoever (*b*); *And further*, that until the said [*debtor*], his heirs, executors, or administrators, shall have made default in payment of the said several instalments or sums of money so hereinbefore covenanted and agreed to be paid as aforesaid, or some part thereof respectively, they the said several parties hereto of the second part respectively, or their respective heirs, executors, or administrators, will not sue, prosecute, or otherwise molest or disturb him the said [*debtor*], or do any act or thing, by means or in consequence whereof the person of him the said [*debtor*], or his real or personal property, or any part thereof respectively, shall or may be imprisoned, seized, taken in execution, or otherwise prejudicially affected, for or in respect of the said several debts or sums due to them the said parties hereto of the second part respectively, or the interest thereon respectively, or otherwise in relation thereto; And if, contrary to or in violation of this present covenant, any action or other proceeding shall be commenced or instituted by any or either of them the said parties hereto of the second part, or their respective executors or administrators, then and in every such case these presents shall and may be pleaded and shewn in bar thereto; PROVIDED ALWAYS, and it is hereby expressly agreed and declared between and by the said

instalments, and, until the debtor shall have made default in paying the instalments, not to sue or molest him.

Proviso, that on default these presents shall be void.

(*b*) If the debtor is not satisfied with a common money receipt, which would be sufficient, as payment is eventually made in full, the release should be at his expense.

[*debtor*], and the said several parties hereto of the second part, that if default shall be made by the said [*debtor*], his heirs, executors, or administrators, in paying any or either of the said several instalments or sums of money so hereinbefore covenanted and agreed to be paid by him or them as aforesaid, or any part thereof respectively, at the respective times and in the manner hereinbefore mentioned and appointed in that behalf, then and in such case the said covenant or agreement hereinbefore contained on the part of the said several parties hereto of the second part, shall immediately upon the happening of any such default, cease, determine, and be absolutely null and void, to all intents and purposes whatsoever; And the said several parties hereto of the second part, or their respective executors or administrators, shall have and be entitled to such and the same remedies for recovery of their respective debts, or of so much thereof respectively as shall for the time being remain owing and unpaid, as they would have had if these presents had not been executed, any thing hereinbefore contained to the contrary thereof in anywise notwithstanding (*c*). IN WITNESS, &c.

COVENANT TO PAY BY INSTALMENTS.

(*c*) It does not appear to have been usual in composition deeds to reserve the creditors' remedies against sureties. The only provision applicable to the case that is commonly found, is a declaration, that in the event of any third persons who are bound for any of the debtor's engagements refusing to concur, the execution of the deed, by the creditor possessing such claims, shall be void. A creditor, however, it is now clear, may go further than this: he may qualify his release to the principal debtor by an express reservation of his claims against a surety; for, though undoubtedly the effect of such a qualification is to leave the debtor open to a demand on the part of the surety, who, on being called on to pay the debt, will have a claim on the principal debtor for the amount so paid; yet it is more beneficial for the surety that the creditor should accept part of the debt from the principal, and resort to him (the surety) for the residue, than that he should call upon the surety for the whole debt in the first instance. Thus, suppose A. as principal, and B. as surety, to be debtors of C. in the sum of 500*l.*; A. makes a composition with his creditors, paying them 10*s.* in the pound; C., as the creditor of A., accepts the composition for his debt, expressly reserving his claim against B. the surety, and afterwards calls upon B. to pay him the undischarged moiety of the debt, which B. accordingly pays. If B. is allowed to take a divi-

As to compounding creditors reserving claims against sureties.

COVENANT TO PAY BY INSTALMENTS.

dend as a compounding creditor on the 250*l.* so paid, his loss is reduced to the sum of 125*l.*; while, on the other hand, if C., the creditor, instead of joining in the composition, had called upon B. to pay the whole 500*l.*, B. having paid this sum, and coming in under the composition as a creditor for 500*l.*, would have lost 250*l.*

If a clause reserving remedies against sureties is added to the precedent in the text, it may be in the following terms:—

Proviso, reserving the releasor's claims against sureties.

"PROVIDED ALWAYS, and it is hereby declared, that nothing herein contained shall prejudice or affect any claim, demand, or remedy which the said several parties of the second part, or any or either of them, now have or hath, or which they, or any or either of them, or the heirs, executors, or administrators of them or any or either of them, shall or may at any time or times hereafter have upon or against any person or persons who may happen to be liable for the payment of any of the said debts of the said [*debtor*], in the character of a surety or sureties for him, or otherwise, any thing hereinbefore contained, or any rule at law or in equity to the contrary notwithstanding."

It may not be amiss in this place to notice, that signing a bankrupt's certificate has lately been decided not to be such an act as discharges a surety. *Brown* v. *Carr*, 5 Moore & Payne, 497.

RELEASE BY CREDITORS.

RELEASE *by* CREDITORS *to their* DEBTOR, *on receiving* PROMISSORY NOTES *and* BILLS *of* EXCHANGE *for a* COMPOSITION *on their Demands, payable by Instalments.* (*Variation where the* CREDITORS *merely* COVENANT NOT *to* SUE).

TO ALL TO WHOM THESE PRESENTS SHALL COME, we, whose hands and seals are hereunto subscribed and affixed, being creditors respectively of [*debtor*], of &c., severally SEND GREETING: WHEREAS the said [*debtor*] is justly indebted unto us, his said creditors, in the several sums of money stated in the first column of figures set opposite to our respective names in the schedule hereunder written. AND WHEREAS the said [*debtor*], by reason of various losses

Recitals.

and misfortunes in trade, is rendered unable to pay us, his said creditors, the full amount of our said several debts, and has therefore proposed and agreed to pay, and we, his said several creditors, have agreed to accept and take a composition or dividend of 10*s.* in the pound, upon the amount of, and in full satisfaction for, our said respective debts, by three instalments, in the manner and at the several periods following: (that is to say), 2*s.* 6*d.* in the pound at four months, 2*s.* 6*d.* in the pound at eight months, and the remaining 5*s.* in the pound at twelve months, such several periods to commence and be computed from the day of the date of these presents; the first and second of the said instalments to be secured by the promissory notes of the said [*debtor*]; and the third to be secured by bills of exchange, to be drawn by the said [*debtor*] upon, and accepted by [*surety*], of &c., the brother of the said [*debtor*]; and, upon the delivery of such notes and bills, we, the said several creditors, have agreed to execute to the said [*debtor*] such (*a*) general release as is hereinafter contained. NOW KNOW YE, that we, the said several creditors of the said [*debtor*], in pursuance of the said recited agreement on our parts, and in consideration of the said dividend or sum of 10*s.* in the pound on the amount of our said several debts being secured to be paid unto us respectively in manner aforesaid, for and on behalf of ourselves and our several and respective partners, *Do* and each and every of us *Doth* (*b*), by these presents, absolutely re-

RELEASE BY CREDITORS.

(*a*) If the release is by way of covenant, say—
"such covenant."

(*b*) If the release is made by way of covenant, in order to prevent its discharging co-debtors, agreeably to a suggestion *ante*, p. 445, vary the precedent thus—

"hereby covenant with the said [*debtor*], his executors and administrators, that we, the said several creditors respectively, or our respective partners, or the respective executors or administrators of us or them respectively, shall not, nor will, at any time or times hereafter, commence, sue out, or prosecute any action, suit, execution, or other proceeding in any Court of law or equity, against the said [*debtor*], his executors or administrators, for the enforcement or recovery of any cause or causes of action or suit, controversies, damages, claims,

COVENANT NOT TO SUE.

RELEASE BY CREDITORS.

mise, release, and for ever quit claim unto the said [*debtor*], his heirs, executors, and administrators, all and all manner of action and actions, suit and suits, cause and causes of action and suit, controversies, damages, claims, and demands whatsoever, which we the said several creditors of the said [*debtor*], or any or either of us, either alone or jointly with our respective partners, now have, or which we, or any or either of us, or any or either of our respective partners, or our or their respective heirs, executors, or administrators, at any time or times hereafter, can, shall, or may have, or be entitled to, from, upon, or against the said [*debtor*], his heirs, executors, or administrators, by reason or on account of any debts, sums of money, bills, notes, securities for money, contracts, promises, agreements, reckonings, accounts, dealings, or transactions whatsoever, owing from, or made or given, or entered into by the said [*debtor*] to or with us respectively, either alone or jointly with our respective partners, or transacted, done, or depending by and between him and us respectively, or our respective partners, or any or either of us or them, from the beginning of the world

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and demands whatsoever, which we the said several creditors of the said [*debtor*], or any or either of us, either alone or jointly with our respective partners, now have, or which we, or any or either of us, or any or either of our partners, our or their respective heirs, executors, or administrators, at any time or times hereafter, can, shall, or may have or be entitled to, from, upon, or against the said [*debtor*], his heirs, executors, or administrators, by reason or on account of any debts, sums of money, bills, notes, securities for money, contracts, promises, agreements, reckonings, accounts, dealings, or transactions whatsoever, owing from, or made, given, or entered into by the said [*debtor*] to or with us respectively, either alone or jointly with our respective partners, or transacted, done, or depending by and between him and us respectively, or our respective partners, or any or either of us or them, from the beginning of the world to the day of the date of these presents, (save and except the said promissory notes and bills of exchange for securing the payment of the said composition or instalments as aforesaid). IN WITNESS, &c.

to the day of the date of these presents, (save and except the said promissory notes and bills of exchange for securing the payment of the said composition or instalments, as aforesaid). In witness whereof we have hereto set our hands and seals, this —— day of ——.

RELEASE BY CREDITORS.

SCHEDULE to which the preceding deed-poll refers.

Creditors.	Debts.	Dividends.
A. B. & Co.	£150 0 0	£75 0 0
C. D.	48 10 0	24 5 0

BETWEEN DEBTORS, CREDITORS, AND SURETIES.

COVENANT *by* Sureties *to* accept *Bills for a* Composition Dividend, *provided all the Creditors execute by a certain Day.* Creditors covenant not *to* sue *the* Debtors *in the meantime; and on the* Payment *of the* Bills *to give a* general Release (*a*).

THIS INDENTURE, made the —— day of ——, Between [*debtors*], both of ——, and partners, of the first Parties.

(*a*) The difference between this precedent and the last will be instantly observed—*There* the release is immediate and absolute on the delivery of the bills for the composition, which takes place at the execution of the deed: *Here*, the creditors merely covenant to execute a release when the bills are paid; and therefore, in the event of the bankruptcy of the debtor intervening to prevent the payment of the bills, the creditors would be entitled to prove against his estate for their original demands, and not for the composition dividend only, to which their claim would necessarily be limited, if they had absolutely discharged him from the debts on his giving bills for the composition. *Vide ante*, p. 430. It is certainly more usual to make the release, or the agreement for giving it, conditional, on

Remarks upon the precedent in the text.

BETWEEN DEBTORS, CREDITORS, AND SURETIES.

part; [*sureties*], of &c., of the second part; and the several other persons, parties hereto, being creditors of the said [*debtors*], of the third part: WHEREAS the said [*debtors*] are justly indebted to the said parties hereto of the third part respectively, in the several sums of money set opposite to their respective names and seals hereunto subscribed and affixed, and being unable at present to pay the same, the said several parties hereto of the third part have agreed to accept the sum of 13*s.* 4*d.* in the pound on the amount of their respective debts, to be paid by four equal instalments at the end of four, six, eight, and ten calendar months, in full payment and satisfaction of their several debts, upon having such instalments secured by the bills of the said [*debtors*], to be accepted by the said [*sureties*] in manner hereinafter mentioned. NOW THIS INDENTURE WITNESSETH, that the said [*sureties*] do, for themselves, their heirs, executors, and administrators, jointly, and each of them doth for himself, his heirs, executors, and administrators, severally, covenant and agree with the said parties hereto of the third part respectively, their respective executors and administrators, in manner following, (that is to say), that they the said [*sureties*], their executors or administrators, in case all and every the said creditors of the said [*debtors*], whose respective debts amount to the sum of 10*l.* or upwards, (the execution by one partner in a firm being for this purpose considered as equivalent to an execution by all the members thereof), shall within the space of three calendar months now next ensuing, duly sign and execute these presents, shall and will, upon being thereunto re-

Recital of the debts owing to the creditors, and of the agreement for a compromise.

Testatum.

Joint and several covenant by sureties to accept bills for dividend, in case all the creditors execute by a certain time.

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the payment of the dividends, especially if the dividend or any part of it is to be provided by the debtor himself; for, of course, it is desirable that the creditors should retain in their hands as much influence as possible over the debtor, in order to induce the performance of his engagement; and the power of recurring to their original claims against him on his default seems to be the most conducive to this end.

It may not be amiss to observe, that where a release is given, or any other act done, in consideration of a sum of money to be secured by a bill of exchange, it should always be explicitly declared, whether the consideration is the immediate act of giving the bill or the future act of paying it at maturity.

BETWEEN DEBTORS, CREDITORS, AND SURETIES.

quested by the said parties hereto of the third part respectively, or their respective executors or administrators, accept four several bills of exchange, to be drawn upon them by the said [*debtors*], in favour of the said parties hereto of the third part respectively, or their respective executors or administrators, for a sum equal to the amount of 3*s.* 4*d.* in the pound on their said respective debts due and owing to the said parties hereto of the third part respectively, or their respective executors or administrators, and set opposite to their said respective names and seals hereunto subscribed and affixed as aforesaid (*b*), all such bills to bear date on this instant —— day of ——, and one of them to be payable four months after the date thereof, one other of such bills of exchange to be payable six months after the date thereof, one other of such bills of exchange to be payable eight months after the date thereof, and the other of such bills of exchange to be payable ten months after the date thereof. AND THIS INDENTURE FURTHER WITNESSETH, that, in further pursuance of the said agreement, and in consideration of the covenant hereinbefore contained on the part of the said [*sureties*], they the said several parties hereto of the third part, each of them separately and apart for himself, his heirs, executors, and administrators, and for his own acts and deeds only, but not jointly, or the one of them for the others or other of them, or the acts of any others or other of them, do severally covenant and agree with the said [*debtors*], their heirs, executors, and administrators, by these presents in manner following, (that is to say), that they the said several parties hereto of the third part respectively, or their respective executors or administrators, or partner or partners, shall not nor will sue, arrest, attach, take in execution, or otherwise molest them the said [*debtors*], or either of them, their or either of

Further *testatum.*

Covenant by the creditors not to sue until default in payment of the bills.

(*b*) Where the trustees in a composition deed covenanted with the creditors to pay them a dividend of 7*s.* 6*d.* in the pound on their respective debts, and which were set opposite to their respective names and seals; it was held, that it was no ground of defence to an action by a creditor, to allege that there was not any sum set opposite to his name. *Daniell* v. *Saunders*, 2 Chit. Rep. 564.

BETWEEN DEBTORS, CREDITORS, AND SURETIES.

If any of the creditors sue, the debtors to be discharged from the claims of such creditors.

their goods, chattels, estate or effects, in any manner howsoever, or upon any pretence whatsoever, until default shall have been made in payment of the said four several bills of exchange, or some or one of them, or some part thereof (*c*); *And further*, that if any of the said parties hereto of the second part, their or any of their executors or administrators, partner or partners, shall so act contrary to the true intent and meaning of these presents, and the covenant herein contained, that then they the said [*debtors*], their heirs, executors, and administrators, shall be, and by these presents are absolutely discharged of and from all debts, claims, and demands

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Debtor not discharged until payment of all the instalments.

(*c*) Of course, where creditors agree to accept instalments in satisfaction of their full debts, they do not intend to discharge the debtor unless and until the whole instalments are paid; (*vide ante*, p. 426); and that construction prevailed in one instance in which the language of the instrument afforded ground for a contrary construction. The creditors stipulated to accept a dividend of 12*s.* 6*d.* in the pound, to be paid in the following manner:—5*s.* within six months or sooner, provided a certain leasehold estate of the debtor should be sold, and the consideration money received; the further sum of 2*s.* 6*d.* in three months from the date of the agreement, the further sum of 2*s.* 6*d.* in six months, and the last dividend of 2*s.* 6*d.* in nine months; the sum of 7*s.* 6*d.* (being the three last mentioned dividends), to be secured by the joint notes of the debtor and another, and that the several creditors would not, *after payment of the said* 7*s.* 6*d. in the pound*, sue the debtor. The 7*s.* 6*d.* had been paid, but not the 5*s.*, although the six months had elapsed. To an action brought by one of the creditors for the whole remainder of his debt, the defence was, that the defendant was, by the terms of the composition, discharged on the payment of the dividend of 7*s.* 6*d.* in the pound; but the Court held, that the dividend of 5*s.* in the pound not having been paid, the creditors were remitted to their original demands. Sir *J. Mansfield*, C. J., observed—"If the words express the payment of the three last dividends to be the consideration of the promise not to sue, it is only because the parties designated the completion of the agreement by the performance of the act which was last in order of time to be done on the part of the defendant, contemplating, as they did, that the dividend of 5*s.*, which was to be paid sooner if the leasehold should be sooner sold, would at all events be paid within the period of six months from the date of the agreement; whereas the last of the other three dividends was not to be paid till nine months after the expiration of the former period." *Walker* v. *Seabourne*, 1 Taunt. 526.

whatsoever, both at law and in equity, from, by, or on the part of the creditor or creditors by whom the said [*debtors*], or their or either of their estate and effects, shall be so sued, arrested, attached, taken in execution, or otherwise molested as aforesaid, at any time from the date hereof, until default shall have been made in payment of the said several bills of exchange, or some or one of them, or some part thereof respectively; *And lastly*, that upon payment of the several bills of exchange to the said several parties hereto of the second part, or their respective executors or administrators, at the maturity thereof as aforesaid, They the said several parties, or their respective executors or administrators, shall and will, on the request, and at the costs and charges of the said [*debtors*], their executors or administrators, duly execute and deliver to the said [*debtors*], their executors or administrators, a valid and effectual release, thereby releasing and for ever discharging the said [*debtors*], their executors and administrators, from all debts and sums of money now due and owing from them the said [*debtors*] to such creditors respectively, and from all actions, suits, claims, and demands whatsoever at law or in equity on account thereof. In witness, &c.

BETWEEN DEBTORS, CREDITORS, AND SURETIES.

And upon payment of the bills, to execute a release to the debtors.

DEED *of* Inspectorship; Letter *of* License, *with* Power *to the* Inspectors *to* extend *it; and* ordinary Clauses *providing for the* Conversion *and* Application *of the* Joint *and* Separate Estates *of the* Debtors. Some Family Creditors *consent to the* Postponement *of their* Claims.

DEED OF INSPECTORSHIP, AND LETTER OF LICENSE.

THIS INDENTURE, made the —— day of ——, in the year of our Lord 18—, Between [*debtors*], of ——, wine merchants and partners, of the first part; [*family creditors*], of ——, creditors of the said [*debtors*], as partners, of the second part; [*inspectors*], of &c., creditors of the said

Parties.

DEED OF INSPECTORSHIP, AND LETTER OF LICENSE.

[*debtors*], and also hereinafter appointed inspectors of their concerns, of the third part; and the several other persons whose names and seals are hereunto subscribed and affixed, also being creditors of the said [*debtors*], of the fourth part:

Recital of trading, &c.

WHEREAS the said [*debtors*] have for many years past carried on the said trade or business of wine merchants in partnership, under the firm of [A. B. & Co.], and as such partners have become indebted to the parties hereto of the second, third, and fourth parts, in the several sums set against their respective names, which at present the said [*debtors*], by reason of some recent heavy losses in trade, are unable to discharge; And the said [*debtors*] respectively owe certain sums on their separate accounts, but their separate estates are more than sufficient to pay their separate debts;

—Intended arrangement.

And it has been agreed and determined that the affairs of the said [*debtors*] in their separate capacities shall be wound up; and that the affairs of the said partnership estate shall be managed and wound up by the said [*debtors*], under the inspection of the said [*inspectors*], and that for that purpose the requisite legal measures should be taken under their direction, and that they should be authorized to make the said [*debtors*] such a compensation for their trouble as they might think proper; And the said parties hereto of the second part have agreed to postpone the receipt of any dividends by themselves until the other creditors have received 5*s.* in the pound on their debts, as hereinafter mentioned.

Testatum.

NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the covenant hereinafter contained on the part of the said [*debtors*], They the said several creditors, parties hereto of the second, third, and fourth parts, for themselves respectively, and their respective partners, heirs, executors, and administrators, acts and deeds only, and so that each sole creditor on the said joint estate shall be answerable only for himself and his heirs, executors, and administrators, acts and deeds, and so that the partners in every partnership being creditors on the said joint estate, shall be jointly answerable only for the acts, deeds, and defaults of the partnership, and of all and every the partners therein, and the heirs, executors, and administrators, of all and every such partners, *Do* hereby respectively, so far as they lawfully can, (but subject nevertheless to the proviso hereinafter con-

Letter of license for two years.

DEED OF INSPECTORSHIP, AND LETTER OF LICENSE.

tained), give and grant unto the said [*debtors*], and each of them, and their respective executors and administrators, absolute liberty and license henceforth until the —— day of ——, in the year of our Lord 18—; And if an extended term should be granted by virtue of the provision for that purpose hereinafter contained, Then, until the expiration of the extended term (unless this license shall be sooner avoided by virtue of the provision for that purpose hereinafter contained), to convert their partnership estate and effects into money, and wind up all their partnership affairs, under the inspection and control of the said [*inspectors*], or the inspectors or inspector for the time being, in such manner as they or he shall from time to time think fit and direct; And they do moreover hereby covenant and agree with the said [*debtors*], their executors and administrators, That they the said several creditors, parties hereto of the second, third, and fourth parts, or their respective executors, administrators, partner or partners, shall not nor will during the continuance of the said license, arrest, imprison, sue, or proceed, either at law or in equity, against the said [*debtors*], or either of them, or their or either of their heirs, executors, or administrators, or the estates, lands, tenements, goods, chattels, or effects of them or any of them. And if the said several creditors, parties hereto, of the second, third, and fourth parts, or any or either of them, or their or any or either of their heirs, executors, or administrators, partner or partners, shall commit a breach of the aforesaid covenant, then they the said [*debtors*], their heirs, executors, administrators, and joint and separate estates and effects, shall be, and they are for ever hereby clearly acquitted, exonerated, released, and discharged of and from all debts, claims, and demands whatsoever, both at law and in equity, now due and owing from or by the said [*debtors*] to such of the said creditors respectively by whom a breach of the aforesaid covenant shall be committed, and as well such debts, claims, and demands respectively as are now payable and can be immediately enforced, as those which are not payable until a future time or future times, and which cannot be immediately enforced; And that this deed may be impleaded in release of and bar to all actions, suits, and proceedings, in respect of any such debts, claims, and de-

—Or until the expiration of any extended term to be granted as hereinafter mentioned.

Covenant not to sue during the period of license.

If any of the creditors sue contrary to the covenant;

This deed may be pleaded in bar.

DEED OF INSPECTORSHIP, AND LETTER OF LICENSE.

mands, as effectually as if a release thereof had been actually executed by the same creditor or creditors; And that the same creditor or creditors, his, her, or their executors and administrators, shall and will at any time or times after such breach (by way of further satisfaction, though it shall not be deemed necessary to the bar), upon request to him, her, or them, execute one or more release or releases to the said [*debtors*], their heirs, executors, or administrators, of all the said debts, claims, and demands, from, upon, and against the said [*debtors*]. AND in consideration of the license and provisions respectively hereinbefore and hereinafter contained, they the said [*debtors*] do hereby jointly for themselves, their heirs, executors, and administrators, and each of them doth hereby separately for himself, his heirs, executors, and administrators, covenant and agree with the said [*inspectors*], their executors and administrators, in manner following, that is to say, that they the said [*debtors*], their executors or administrators, shall and will, within one calendar month from the day of the date hereof, state in writing, and sign and deliver to the inspectors or inspector for the time being, a true account of all the real and personal estates and effects of their partnership, with all such particulars as may be sufficient to enable the said inspectors to ascertain the same; *And also* shall and will, under the inspection and control of the said [*inspectors*], or the inspectors or inspector for the time being, and in such manner as they or he shall from time to time think fit and direct, convert the estate and effects of the said partnership of [A. B. & Co.], as well in England as abroad, into money, and after the payment of wages or salaries of clerks or agents employed by them, the costs of preparing these presents and a duplicate hereof, and of the arrangement of the said affairs since the said [*debtors*] suspended payment, and all costs which shall be incurred by the said inspectors or inspector for the time being, in consequence of or relating to the arrangement hereby made, and all costs which should be incurred by the said [*debtors*], their executors or administrators, in consequence of or relating to the arrangement hereby made, (provided that such latter costs shall be incurred with the consent of the said inspectors or inspector), and divide the money which shall be produced from the said partnership estate and effects in manner hereinafter mentioned; And for the consi-

Covenants by debtors.

—To deliver an account in writing of their effects.

—And convert the partnership effects.

derations aforesaid, the said [*one debtor*] for himself, his heirs, executors, and administrators, doth hereby further covenant and agree with the said [*inspectors*], their executors and administrators, that the said [*one debtor*] shall and will forthwith, under the inspection and control of the said [*inspectors*], or the inspectors or inspector for the time being, convert the separate estate and effects which he is now possessed of or entitled to into money, and with the produce thereof shall and will, after deducting and allowing all necessary expenses, pay to his separate creditors the debts due from him to them, and that he will immediately thereupon render to the said inspectors or inspector a true account of such estate, and the produce thereof, and of all receipts and payments on account thereof; And will pay the balance of cash, which shall remain after payment of his debts, into the said partnership concern, to be applied with the produce of the said partnership estate for the benefit of the said partnership creditors in manner hereinafter mentioned. *(Similar covenant by the other debtor).* AND the said [*debtors*], for the considerations aforesaid, do jointly for themselves, their heirs, executors, and administrators, and each of them doth separately for himself, his heirs, executors, and administrators, covenant and agree with the said [*inspectors*], their executors and administrators, that they the said [*debtors*], their executors or administrators, will from time to time, when directed in writing so to do by the inspectors or inspector for the time being, divide the money which shall be produced from the said partnership estate and effects after the deductions and allowances aforesaid, and also the surplus, after payment of the separate debts, of the produce of the said separate estates, which shall be carried to the account of the joint estate as aforesaid, among the creditors of the said [*debtors*], as partners, proportionally according to the several amounts which at the time of division shall be due to the said creditors respectively, subject to the postponement of the dividends of the said parties hereto of the second part as hereinafter mentioned; And shall and will from time to time, as and when the same shall be received, deposit all monies and securities for money which shall be produced from their said partnership estates and effects, or shall be received from the surplus of the said separate estates, or either of them, in the hands of Messrs. [L. & Co.],

Separate covenants by debtors to convert their separate estates.

Joint and several covenant by debtors to divide the produce of their estate among the creditors.

—Until division, to deposit monies with bankers.

DEED OF INSPECTORSHIP, AND LETTER OF LICENSE.

their present bankers, or such other bankers as they may from time to time be directed by the inspectors or inspector, to the credit of a new account to be opened by them the said [*debtors*], and will not afterwards draw out any part thereof except to apply the same as herein mentioned; And shall not nor will, on account of the said partnership, incur any new debt, or enter into any new contract, nor apply or dispose of any part of the said partnership estate and effects, except with the previous consent in writing of the inspectors or inspector for the time being; *And also*, that they the said [*debtors*], their executors or administrators, shall and will from time to time keep proper accounts of all their receipts, payments, and transactions relating to the premises, and preserve all letters written to, and copies of letters written by them, and preserve all documents concerning the same, and, at all times when required so to do, shew all the said accounts, letters, copies, and documents, and give all information and assistance in their power to the inspectors and inspector, and wholly wind up the affairs of the said partnership, under the inspection and control of the said [*inspectors*], or the inspectors or inspector for the time being, and in such manner as they or he shall from time to time think fit and direct; *And also*, that they the said [*debtors*] have not nor hath either of them voluntarily made any payment of money, or given or delivered any security on goods to any creditor or creditors, in contemplation of bankruptcy or insolvency, or for the purpose of giving such creditors or creditor a preference. *And it is hereby agreed and declared* by all the said parties hereto, and particularly by the said parties of the second part, that it shall be lawful for the said [*debtors*], out of the monies produced from the said joint estate, or carried to the account thereof from the surplus of the said separate estates, to pay, and they the said [*debtors*] do hereby covenant and agree with the said [*inspectors*], their executors and administrators, that they the said [*debtors*], their executors or administrators, will pay to the other creditors who are parties hereto, and also retain to and for themselves respectively, dividends to the extent of *5s.* in the pound on their respective debts, so soon as the amount of such monies shall be sufficient for that purpose, before payment to the said parties hereto of the second part, respectively, of any dividend on their re-

—Not to incur new debts, or enter into new contracts.

—To keep proper accounts.

—That they have not made any voluntary preference.

Agreement by family creditors to postpone their claims until after a dividend has been made.

spective debts; and after payment to the said other creditors of 5*s.* in the pound on their debts, then the said [*debtors*], their executors or administrators, shall, out of the other monies arising from the said joint estate, or carried thereto, pay to the said parties hereto of the second part, dividends on their respective debts to the extent of 5*s.* in the pound, before they shall make any further dividend among the said other creditors; And all monies which shall arise as aforesaid, and remain after such last-mentioned payments, shall be divided equally among all the creditors, parties hereto of the second, third, and fourth parts, without any other priority or distinction. *And it is also hereby agreed and declared*, that it shall be lawful for the inspectors or inspector for the time being, to make to the said [*debtors*] such allowance, as a compensation for their trouble, as the said inspectors or inspector shall think fit, not exceeding the sum of £——; *And that*, in case any dividend or dividends shall be made before all the creditors of the said [*debtors*], as partners, shall have executed these presents or a duplicate hereof, or shall have acceded to the terms hereof, the said [*debtors*], their executors or administrators, shall be at liberty to retain the rateable dividends of all or any such creditors or creditor as shall not have so executed these presents or a duplicate hereof, or acceded to the terms hereof, to the intent that such rateable dividends may be applied as part of the funds hereby made applicable to the liquidation of the claims of the said creditors; and that the said [*debtors*], their executors or administrators, shall be at liberty, out of the monies or funds so to be retained, to pay such of the same creditors as shall afterwards execute these presents or a duplicate hereof, or accede to the terms hereof, a rateable dividend or rateable dividends, according to the amount of the sum or sums due to such creditor or creditors, before any further dividend shall be made amongst the creditors parties hereto; *And further*, that in case a commission or commissions of bankrupt shall hereafter issue against the said [*debtors*], or either of them, whereon they or either of them shall be declared bankrupt, and which shall prevent or avoid the arrangement made by these presents from being carried into effect, and prior to the issuing of the said commission or commissions any dividend or dividends shall have been made by virtue or in con-

Allowance to debtors.

Inspectors to retain dividends of non-executing creditors.

In case of bankruptcy, composition dividend to be considere as dividend under the bankruptcy.

DEED OF INSPECTORSHIP, AND LETTER OF LICENSE.

sequence of these presents, then the creditors who shall have received the same shall respectively be admitted as creditors under the said commission or commissions, for the full amount of their respective debts now due to them, (except so far as they may have received the same or any part thereof respectively from other sources than the said trust fund); in which case, the amount of all dividends received by such creditors under or in consequence of these presents, shall be considered as so much received for dividends under the said commission.

Specification of debts, not to confer priority.

And it is hereby further agreed and declared, that the specification of the several sums claimed by the persons parties hereto of the second, third, and fourth parts, against their respective names and seals, shall not be deemed to be evidence of the validity of such claims; *And that* all and every or any of the sums so claimed to be due to such persons respectively, shall, if required by the inspectors or inspector for the time being, be verified by the affidavit or affirmation, affidavits or affirmations, of such persons or any of them, (as well with respect to the consideration as the amount of the same), to be sworn or made before a Master, ordinary or extraordinary, of his Majesty's High Court of Chancery, or a magistrate of the county or place in which such persons or person shall reside; But that no such affidavit or affirmation shall be conclusive evidence of the validity of such debt, but that the inspectors or inspector for the time being may litigate the same if they or he shall think fit.

Claims, if required, to be verified on oath.

Inspectors may direct payment in full to creditors under 10*l.*

Provided also, that it shall be lawful for the inspectors or inspector, if they or he shall think proper, to direct the payment to any joint creditor of the said [*debtors*], whose debt may be under 10*l.*, the full amount of such debt, without his becoming a party to these presents.

Inspectors may become bail and defend actions.

And it is hereby also agreed and declared, that if the said [*debtors*], or either of them, should be arrested for any partnership debt or debts, or alleged partnership debt or debts, the inspectors or inspector for the time being may become or procure bail for them or him to the Sheriff, and also special bail, and shall be indemnified in respect thereof out of the said partnership estate and effects, and also by the several other creditors parties hereto; and they do hereby jointly and severally covenant and agree with the said [*inspectors*] respectively, and their respective executors and administrators, to indemnify them and the inspectors and inspec-

tor for the time being accordingly. *And it is hereby further agreed and declared,* that, in case the said [*debtors*], or any part of their estates and effects, shall be sued, attached, sequestered, extended, or taken in execution, or otherwise proceeded against in respect of any partnership debt or debts alleged to be due from them, and if in any such case the inspectors or inspector for the time being shall think fit to contest such alleged debt or debts, then it shall be lawful for them or him to direct the said [*debtors*] to contest the same. *And it is hereby also agreed and declared,* that it shall be lawful for the inspectors or inspector for the time being to direct the said [*debtors*] to pay to any person or persons having any lien or liens, or other security or securities, on any part of the partnership estate and effects of the said [*debtors*], the full amount of the monies due to him, her, or them, and for which he, she, or they shall have any such liens or lien, or security or securities, for the purpose of getting possession of the estates or effects whereon the same may subsist discharged therefrom. *Provided, and it is hereby agreed and declared,* that it shall be lawful for all the creditors, parties hereto, to execute these presents without prejudice to any mortgage, lien, or security which they may have for their respective debts or any parts thereof, or to any claim against any surety or sureties, or any other person or persons who may be liable to the payment thereof; And that no creditor or creditors, party hereto, shall be bound by the license hereby granted, or the covenants herein contained, if the effect thereof, notwithstanding the proviso lastly hereinbefore contained, would be to prejudice the claims of such creditor or creditors against any other person or persons whomsoever, unless such person or persons shall acquiesce therein and consent thereto. *Provided also,* that, in case the said creditors of the said [*debtors*], as partners, who shall execute these presents or a duplicate hereof, or otherwise accede to the terms hereof, shall not be paid the whole of their respective debts within or at the expiration of the term of two years, (that is to say), before or on the said —— day of ——, 18—, then and in such case, it shall be lawful for the inspectors or inspector for the time being, and they and he are and is hereby authorized and empowered to renew and continue, by writing under their or his hands or hand, the license hereby granted,

Inspectors may direct payment to creditors having security.

Collateral securities not to be affected.

Power to inspectors to extend the license to further term.

DEED OF INSPECTORSHIP, AND LETTER OF LICENSE.

and other provisions of these presents, for a further term of two years, to be computed from the said —— day of ——, or for any other time not exceeding that term, upon the footing in all respects of these presents. And that it shall be lawful for the inspectors or inspector for the time being, at any time, and from time to time, upon fourteen days' notice to be given by letter addressed through the Post Office, to convene a general meeting of the creditors, parties hereto, or of their agents, or of the persons authorized to act for them, so far as they shall be known to such inspectors or inspector calling such meeting, at such time and place as such inspectors or inspector shall think fit; and such meeting so convened, and the resolutions of the creditors, or the major part in value of them then and there present, shall be considered and be as binding and effectual on themselves and absentees, as if the whole of the creditors, parties to these presents, had consented thereto; Nevertheless, it is hereby agreed and declared, that such of the creditors as shall not be present at any such meeting, may appoint any other person or persons to act for him, her, or them respectively, as his, her, or their proxy or proxies, attorney or attornies, and that the act and acts of such proxy or proxies, attorney or attornies, shall be considered as the act or acts of the creditor or creditors so appointing him or them, to all intents and purposes. *And it is hereby further agreed and declared*, that the creditors of the said [*debtors*] executing these presents or a duplicate hereof, or otherwise acceding hereto, or any one or more of them, whose debt or aggregate debts doth or do now amount to 1000*l.* or upwards, may at any time, by writing under his or their hand or hands, require the inspectors or inspector for the time being to convene a general meeting of the partnership creditors of the said [*debtors*], and that the said inspectors or inspector shall, within the space of fourteen days next after such requisition, convene a meeting accordingly in the manner mentioned and provided in the clause lastly hereinbefore contained, and shall, if required, at such meeting report their progress, acts, and transactions in and about the premises; And that the resolutions and acts of such meeting, or of the major part in value of the creditors then present, shall be as binding and effectual as if such meeting had been called by the inspec-

—To convene meeting of creditors.

Power to creditors of a certain amount, to require a meeting of creditors to be convened.

DEED OF INSPECTORSHIP, AND LETTER OF LICENSE.

tors or inspector without such requisition; *And further*, that if the whole of the estates and effects of the said partnership shall, during the license hereby granted, be converted into money, and applied in manner hereinbefore mentioned, and shall be insufficient to pay all the creditors, parties hereto, the full amount of their respective debts, and if the said [*debtors*] shall duly perform all their covenants hereinbefore contained, Then the said creditors, parties hereto of the second, third, and fourth parts, and their respective executors, administrators, partners, and assigns, shall and will, at the request and costs of the said [*debtors*], their heirs, executors, or administrators, duly execute and deliver unto them, legal, sufficient, and effectual releases and discharges of and from all debts, claims, and demands whatsoever, which are now due or owing to them the said creditors respectively as aforesaid, and deliver up all bonds, bills, notes, and other securities for the same, from or given by the said [*debtors*], and of and from all accounts relative thereto, and all actions, suits, remedies, and means whatsoever, both at law and in equity, for recovering the same or any part thereof. *Provided nevertheless, and it is hereby also agreed and declared*, that, if the inspectors or inspector for the time being shall at any time hereafter, by deed duly executed by them or him, declare that the said [*debtors*] or either of them, their or either of their executors or administrators, have or hath committed a breach or breaches of any of their covenants herein contained, (either specifying or not specifying the covenant or covenants broken, or the breach or breaches thereof), then the license, time, and other privileges by these presents granted to the said [*debtors*], and all covenants on the part of the creditors, parties hereto, (without prejudice, nevertheless, to any right of action which may previously have accrued thereon), shall thereupon cease and be void; *And* such deed of declaration, and the consequent cesser and avoidance of the said license, time, privileges, and covenants, shall be finally conclusive at law and in equity. AND *it is hereby further agreed and declared*, that, in case of the death of either or any of them the said [*inspectors*], or any person or persons to be appointed in their, any, or either of their stead, as hereinafter mentioned, before the expiration of the said term

License may be determined by a declaration, by deed, by inspectors, that debtors have broken their covenants.

Power of appointing new inspectors in case of death, &c.

DEED OF INSPECTORSHIP, AND LETTER OF LICENSE.

of two years, or the expiration of any such further term, as aforesaid, or before the arrangements made by these presents shall be finally concluded, or in case either or any of them shall go to reside abroad for any longer term than three months, or shall refuse, decline, or become incapable to act in the said affairs, then, and in every such case, it shall be lawful for the continuing inspector or inspectors, if any, or otherwise for the executors or administrators of the last deceased inspector, to name and chuse such person or persons, (being or not being a creditor or creditors of the said [*debtors*]), as they or he shall think fit, in the room or stead of such person or persons as shall so go to reside abroad, die, or refuse, or decline, or become incapable to act, each of which persons so to be chosen as aforesaid shall have the like powers as the person in whose stead he shall be so named and chosen, and shall be considered the same to all intents and purposes, as if he had been named originally in and by these presents; And also, that for all purposes of converting and dividing the said joint estate, the directions of any two of the three inspectors, (if for the time being there shall be three inspectors), shall be sufficient authority to the said [*debtors*], or either of them. *And it is hereby lastly agreed and declared*, that the said [*inspectors*], or any persons or person who shall be appointed in their or any of their stead, or any or either of them, shall not be answerable or accountable for any loss or misfortune which shall or may be occasioned by, under, or in consequence of the performance by them or any of them, of the powers or authorities hereinbefore given to or reposed in them, nor for the non-exercise thereof, nor for their or any of their having erroneously performed or exercised the same; And also, that every of such several persons shall be charged and chargeable only for and with his own wilful defaults, and not otherwise, and shall not be charged or chargeable with or for any loss or damage which shall or may happen by the neglect or default of any other person or persons. IN WITNESS, &c.

Indemnities to inspectors.

LETTER *of* LICENSE *and* DEED *of* INSPECTORSHIP, *containing* PROVISIONS VARYING *from those of the last Precedent.*

LETTER OF LICENSE AND DEED OF INSPECTORSHIP.

THIS INDENTURE, made the —— day of ——, BETWEEN [*debtor*], of &c., merchant, of the first part; [*inspectors*], of &c., creditors of the said [*debtor*], of the second part; and the several other persons whose names and seals are hereunto subscribed and affixed, being also respectively creditors of the said [*debtor*], of the third part. WHEREAS the said [*debtor*] hath carried on the business of a merchant for several years past. AND WHEREAS the said [*debtor*] is justly indebted to the several persons, parties hereto of the second and third parts, either alone or in conjunction with their partners, in the several sums of money in the schedule hereunder written set opposite to their respective names. AND WHEREAS, at a meeting of the said several creditors of the said [*debtor*], held on the —— day of —— now last past, the said [*debtor*] having represented to the said creditors then present, that, in regard there were large sums of money due to him from persons resident abroad, and of divers adventures outstanding, he was unable to proceed in carrying on his trade, and immediately satisfy his said creditors their respective just debts, and he therefore proposed to his said creditors to act in such manner as they should think most conducive to the getting in his estate, and distributing the same among his creditors in the most speedy and advantageous manner; And the said creditors having duly weighed and considered the same, did resolve and agree, that it would be most advantageous to the said creditors, that he the said [*debtor*] should be permitted to collect and dispose of his estate and effects under the inspection of the said [*inspectors*], (who were then unanimously chosen for that purpose), for the term of three years from the —— day of —— last; and thereupon the said [*debtor*], and the said creditors then present, came to the

Parties.

Recital of debtor's trading.

—That he is indebted to parties of second and third parts.

—Resolutions of creditors at a meeting.

LETTER OF LICENSE AND DEED OF INSPECTORSHIP.

agreement hereinafter contained. NOW THIS INDENTURE WITNESSETH, that, in pursuance of and in compliance with the said resolution and agreement, and in consideration of the covenants hereinafter contained on the part of the said [*debtor*], they the said [*inspectors*], and also the several persons parties hereto of the third part, *Do*, and each of them *doth* by these presents, so far as they respectively lawfully can or may, give and grant unto the said [*debtor*], free, full, and absolute liberty and license, at his own will and pleasure, to go, come, pass and repass, abide and continue, to, from, or at any place or places where the nature of his affairs may require, (so as the same be not out of England, unless with the consent of the inspectors), and to manage, collect, get in, and dispose of all his estate, credits, and effects, under the inspection and control of the said [*inspectors*], and the survivors and survivor of them, and other the person or persons to be nominated for that purpose, as hereinafter provided, and in such manner as they shall judge to be most conducive to the benefit of the said creditors from time to time, from the day of the date of these presents until the —— day of ——, which will be in the year of our Lord ——. AND the said [*inspectors*] and the several persons parties hereto of the third part, do hereby for themselves severally, and for their several and respective heirs, executors, administrators, and partners (*a*),

Testatum. Creditors grant to debtors license for three years.

Covenant by creditors with debtor, not to sue for the period specified.

As to a partner's power to bind the rest of the firm to a composition arrangement.

(*a*) In the case of *Hawkshaw* v. *Parkins*, 2 Swanst. 544, a doubt is suggested, whether one of the members of a firm could bind his partners to the acceptance of terms of composition, not amounting to an absolute release, which is clearly within the scope of partnership authority. The then Solicitor-General (Sir *Robert*, afterwards Lord *Gifford*), *amicus curiæ*, intimated an opinion that a partner had no such power, though he admitted that a release by one partner bound all. Such a distinction, however, appears to rest on rather a slender foundation. A power to receive and release a debt, it is conceived, includes the power to reduce or postpone, or in any other manner modify the terms of payment. According to the distinction in question, a covenant not to sue for a debt within a definite time, or perhaps even a covenant not to sue for it at any time, would not bind the firm, though the former operates as a release *pro tanto*, and the latter as a release absolutely; which circumstance appears to bring it within the rules applicable to releases, rather

(but not any of them for any other or others of them), covenant, grant, and agree to and with the said [*debtor*], his executors and administrators, that they the said [*inspectors*], and the said several persons parties hereto of the third part respectively, or their respective heirs, executors, administrators, partner or partners, or any other person or persons by their authority or consent, shall not nor will arrest, seize, attach, or otherwise impede him the said [*debtor*], or his goods, estate, or effects, in any manner howsoever, or upon any pretence whatsoever, before the said —— day of ——; *And further*, that, if the said parties hereto of the second and third parts, or any of them, their or any of their executors, administrators, partner or partners, shall so act, contrary to the true intent and meaning of these presents, then the said [*debtor*], his heirs, executors, and administrators shall be, and is and are for ever by these presents absolutely discharged from all claims and demands whatsoever, both at law and in equity, of or by the creditor or creditors by whom he the said [*debtor*], or his estate and effects, shall be so sued, arrested, seized, attached, or otherwise impeded as aforesaid, within the period aforesaid, contrary to the covenant in that behalf hereinbefore contained; And that this present letter of license shall and may be pleaded in bar to any such action or actions, or other proceedings at law or in equity, that shall or may be brought or commenced against the person, goods, or chattels of the said [*debtor*] as aforesaid, as effectually as if he had an absolute release from such creditor or creditors respectively. And in pursuance of the said agreement, and in consideration of the license and liber-

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—If they do, these presents to be a bar.

Covenant by debtor with inspectors.

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than the rules applicable to covenants. Convenience, if allowed a voice in the matter, would plead on the same side, as it would generally be difficult, and sometimes impossible, to obtain the signature of all the individuals composing the firms of creditors joining in composition deeds.

Where the deed purports to be made by the creditors who execute it, the partners of persons executing on behalf of their firms are not parties to the deed, and therefore ought not to be joined in actions brought upon the covenants, (*vide ante*, p. 414).

Where any of the creditors execute by attorney, the execution should be in the name of the principal, (*vide ante*, Vol. 1, p. 19, 2nd ed.); and the mode of execution need not be referred to in the body of the deed.

Execution by attorney.

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ty hereinbefore contained, the said [*debtor*], for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said [*inspectors*], their executors and administrators, in manner following, (that is to say), that he the said [*debtor*] shall and will, as soon as may be, draw out and state a just, true, and exact account in writing of all his estate and effects, as well real as personal, and of the several charges, outgoings, and incumbrances now affecting the same, and bring the said account to a close or balance, and shall and will thereupon deliver such account signed by him unto the said [*inspectors*], and shall and will, if thereto required by the said inspectors, verify the truth of such account upon oath before any one of the Masters of the High Court of Chancery, or such other person as they the said inspectors shall nominate for that purpose; *And further*, that he the said [*debtor*] shall and will from time to time, and at all times, to the utmost of his power, observe, perform, and comply with the orders, instructions, and advice of them the said [*inspectors*], touching the ordering, managing, getting in, and disposing of the said estate and effects, and distributing the same amongst the creditors of the said [*debtor*]; *And also* shall and will use his utmost endeavours to collect and get in and convert the same into money as soon as may be (*b*);

—To state an account in writing of his affairs.

—Verified upon oath if required.

—To observe the instructions of the inspectors.

—To use his best endeavours to collect and get in the estate.

(*b*) Sometimes, the distribution of the funds is to be made by the inspectors, and then the following variation is applicable:—

Variation, where the debtor is to pay over monies received, to the inspectors.

"*And also* shall and will from time to time, when and as such monies shall be received, pay the same into the hands of the said inspectors for the time being, to be by them from time to time paid, retained, and distributed unto and among the several parties hereto of the second and third parts respectively, and their respective executors, administrators, or assigns, rateably and proportionally, according to the amount of their said respective debts, until the whole thereof, or so much as the same monies shall extend to pay, shall be liquidated; (*adding, if the debts are to carry interest*, with interest thereon at the rate of *5l. per cent. per annum*, to be computed from the day of the date of these presents); such distribution to be made from time to time as often as the sum in hand shall be sufficient to pay a dividend of 2*s.* in

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And also shall and will from time to time, when and as often as there shall be in hand money arising from the estate and effects sufficient to answer and pay 10*l.* *per centum* upon or in respect of the debts now owing by the said [*debtor*], pay and distribute such money unto and among the said parties hereto of the second and third parts respectively, and their respective executors or administrators, rateably and proportionally according to the amount of their respective debts, until the whole of such debts shall have been paid and discharged, so far as such present estate or effects of the said [*debtor*] will extend to pay and discharge the same; And that all the cash which shall from time to time be in hand arising from the said estate and effects, until the same shall be distributed as aforesaid, shall be laid out at interest upon such Government securities for the benefit of the said creditors, or be deposited in such bank or banker's hands for safe custody as the said inspectors shall think fit, or direct and require; *And further,* that in case the said [*debtor*] shall happen to depart this life before the said —— day of ——, and before the whole of his present estate and effects shall have been converted and distributed under the provisions of these presents, that then and in such case the executors or administrators of the said [*debtor*] shall, within the space of one calendar month next after his decease, on the request and at the costs and charges of the said [*inspectors*], or the survivors or survivor of them, or other the inspectors or inspector for the time being appointed under the power in that behalf hereinafter contained, effectually assign or otherwise assure and deliver unto them or him, all

In case of debtor's decease before the specified period, his executors or administrators to assign his estate to inspectors.

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the pound on the amount of the said respective debts, or sooner, if creditors whose aggregate debts amount to the sum of £——, shall signify in writing to the said inspectors for the time being their wish and desire that the fund in hand should be divided forthwith, in which case an immediate distribution thereof shall be made; And that the monies which from time to time shall remain in the hands of the said inspectors, shall be deposited in the bank of Messrs. —— & Co., at ——, or at such other bank as the said inspectors shall from time to time appoint, to the joint account of the said inspectors."

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and every the estate and effects of the said [*debtor*], which he shall die possessed of or entitled unto, to the intent that the same, or a sufficient part thereof, shall and may be applied in full satisfaction and discharge of all such parts of the claims and demands of the said parties hereto of the second and third parts respectively, or their respective executors and administrators, as shall then remain unliquidated;

In case of refusal, these presents to be void.

Provided always, that in case the said executors or administrators of the said [*debtor*] shall, upon request to be made to them for that purpose by the said inspectors, neglect or refuse to make such assurance and delivery as aforesaid, within the time aforesaid, That then and in such case these presents, and every clause, article, matter, and thing herein contained, shall from thenceforth cease and be utterly void, to all intents and purposes whatsoever, any thing hereinbefore contained to the contrary thereof in anywise notwithstanding;

Inspectors to allow 300*l.* a-year to debtor.

Provided also, nevertheless, and it is hereby further declared, that the said inspectors shall yearly and every year, for the period of three years, to be computed from the —— day of —— now last past, pay and allow to the said [*debtor*] out of the said money to arise from his said estate, an annuity of 300*l.* for the necessary subsistence of himself and family, and as a recompense for his trouble in the management and winding up of his affairs, he the said [*debtor*] thereout providing and maintaining all such proper clerks and book-keepers, as they the said inspectors shall think necessary for the conduct and winding up of his affairs;

Debtor to occupy house rent-free.

And that the said [*debtor*] shall be at liberty to occupy and reside at his house in ——, and have the use of the furniture therein respectively during the said period of three years, without paying any rent for the same, they the said [*inspectors*] paying and discharging the rent and taxes becoming due in respect thereof, if they shall think proper so to do, out of the said estate and effects;

Inspectors to pay law charges.

Provided also, and it is hereby declared, that it shall be lawful for the said inspectors to pay out of the first money which shall come to their hands out of the estate and effects of the said [*debtor*], all law charges, and also all other incidental expenses occasioned by or relating to the getting in and disposing of the estate and effects of the said [*debtor*], and distributing the produce thereof amongst his creditors as aforesaid;

—May pay certain creditors in full.

Provided also, and it is hereby further declared, that it shall be

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lawful for the said inspectors to pay the present creditors of the said [*debtor*], whose debts respectively do not exceed the sum of 20*l.*, the whole of their respective debts; *Provided also*, and it is hereby declared, that in case any such dividend or dividends as aforesaid shall be made of the said estate and effects before all the said creditors of the said [*debtor*], whose debts respectively shall amount to the sum of 20*l.*, shall have executed these presents, or a duplicate thereof, or have otherwise acceded thereto, the said inspectors shall be at liberty to retain the rateable dividend of all or any such creditor or creditors as shall not have so executed or acceded, and pay the same to such creditor or creditors on his or their executing these presents or acceding thereto, or, in case no such retention shall be made by the said inspectors, they shall be at liberty, out of the first money which shall afterwards come to hand arising from the said estate, to pay such of the said creditors as shall afterwards so execute or accede, a rateable dividend or dividends on the amount of the debt or debts of such creditors or creditor, before any further dividend shall be made among the said creditors parties hereto; AND the said [*debtor*] doth hereby for himself, his heirs, executors, and administrators, further covenant and agree with the said [*inspectors*], their executors or administrators, that he the said [*debtor*] shall not nor will at any time hereafter convey, pay away, alienate, dispose of, pledge, or incumber any of his real or personal estate or estates or effects now belonging to him, or to or in which he hath any right, title, or interest, without the consent of the said [*inspectors*]; And shall not nor will knowingly or willingly commit, or suffer to be done or committed, any act, deed, matter, or thing whatsoever, whereby any of the said creditors may have any additional security for his, her, or their demand or demands, or otherwise obtain any preference or advantage over any other or others of them, except the demands of such creditors as do not respectively exceed the sum of 20*l.* as aforesaid; *And further*, that the said [*debtor*] shall and will from time to time keep proper books of account relating to the said estate and effects, and therein make or cause to be made true and proper entries of all his receipts, payments, and disbursements, and of all other such transactions and things as shall be requisite and proper ac-

Inspectors may retain dividend of non-executing creditors.

Covenants by debtor not to alienate or incumber his estate.

—Nor to prefer any creditor.

—To keep proper books.

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cording to the methods and customs of merchants, for the purpose of shewing from time to time the state and condition of his estate and effects; *And also* shall and will permit and suffer each and every of them the said [*inspectors*], and other the inspectors for the time being, from time to time, and at all reasonable times in the daytime, to inspect and examine the said books of account, and all other books, papers, and writings in the custody or power of the said [*debtor*], relating to his said estate and effects, or any part thereof, and shall and will from time to time once in every month, or oftener if required by the said inspectors, report fully, and explain to them the said inspectors the state and condition of the said estate and effects, and all accounts and other matters relating thereto, and of his the said [*debtor's*] receipts, payments, and other proceedings therein; *And also* that he the said [*debtor*] shall and will, if thereto required by the said [*inspectors*], verify the truth of such accounts upon oath before one of the Masters of the High Court of Chancery, or such other person as the said inspectors shall nominate for that purpose; *And further*, that he the said [*debtor*] shall not nor will, before the said —— day of ——, (unless he shall before that time have paid his creditors parties hereto their whole debts), either alone or in conjunction with any other person or persons whomsoever, become engaged in or undertake any new adventure or commercial transaction in trade or other business, nor become bound for, or be bail or security for any person or persons whatsoever, other than and except by and with the consent in writing of the said inspectors; *Provided also*, that in case the said [*debtor*], or his estate, shall be sued or arrested, sequestered or seized by any of his creditors, and if in any such case the said [*inspectors*] shall think fit to bail the said [*debtor*], and contest the demand or demands of such creditor or creditors, then and in such case the said [*inspectors*], or such of them as shall become such bail, shall be paid and reimbursed and indemnified out of the estate of the said [*debtor*], any costs, expense, or damage which they or he shall pay or sustain in consequence of their or his being such bail; And each of them the said creditors, parties hereto of the second and third parts, doth hereby for himself, his heirs, executors, and administrators, covenant and agree with the said [*debtor*], his executors

—And to permit inspectors to examine the same.

—To verify accounts upon oath if required.

—Not to undertake any new adventure.

—Except with the consent of the inspectors.

Inspectors may defend actions for debtor, and indemnify themselves out of the estate.

Covenant by creditors to give a release at the end of three years, or sooner, when the whole

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and administrators, that when and as soon as all the present estate and effects of the said [*debtor*] shall have been distributed among the said parties hereto of the second and third parts respectively, or their respective executors or administrators, or otherwise applied under or by virtue of the provisions of these presents, and the said [*debtor*] shall have fully performed all and singular the covenants and agreements on his part herein contained (and which the inspectors for the time being are required to certify by a memorandum under their hands indorsed on these presents), or in case all the parties hereto of the second and third parts respectively, or their respective executors or administrators shall not, before the said —— day of ——, have received the whole of their respective debts now due from the said [*debtor*] to the said creditors respectively (*c*); And if the said [*debtor*] do and shall, on the said —— day of ——, well and sufficiently convey, assign, and deliver up upon oath unto such person or persons as shall be named by a majority of his the said [*debtor's*] creditors (parties hereto), at a meeting to be held pursuant to a notice given in the London Gazette, all such parts of his present estate and effects as shall then remain undivided, or not otherwise applied according to the true intent and meaning of these presents, for the use and benefit of all the said present creditors of the said [*debtor*], rateably, and render a full and complete account of all his proceedings and transactions relating thereto, then and in such case they the said parties hereto of the second and third parts respectively, or their respective partners, executors, or administrators, shall and will, upon such assignment and delivering up and accounting respectively, duly execute and deliver to the said [*debtor*] a general and effectual release under their respective hands and seals, discharging the said [*debtor*], his heirs, executors, and administrators, from all the debts and sums of money now due and owing from him to such creditors respectively, and from all actions, suits, remedies, claims, and de-

estate has been distributed.

(*c*) If with interest, say—

Interest.

"with interest thereon, at the rate of 5*l. per cent. per annum*, from the date hereof."

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mands whatsoever, both at law and in equity in respect thereof; *Provided always*, nevertheless, and it is hereby expressly declared, that if the said [*debtor*] shall make default in performing all or any of the covenants, clauses, stipulations, and agreements hereinbefore contained and covenanted to be performed on his part, or if all the creditors of the said [*debtor*] whose debts respectively amount to upwards of 20*l.* (except only such creditors whose debts together do not exceed the sum of 1000*l.*, and also such creditors who are possessed of any other securities for their debts, and shall choose to rely thereon), shall not duly execute these presents or a duplicate thereof, or otherwise accede or agree to the terms hereof within the respective spaces of time next hereinafter mentioned, (that is to say), those residing in the United Kingdom within four calendar months next after the day of the date hereof, and in other parts of Europe within twelve calendar months respectively next after the day of the date hereof, then and in either of the said cases this present indenture, and the license and liberty, and every other article, clause, matter, and thing herein contained, so far as the same tends to restrain the said respective parties hereto of the second and third parts, or their respective heirs, executors, or administrators, from suing for and recovering their several demands within the time aforesaid, shall cease, determine, and be absolutely void, any thing hereinbefore contained to the contrary notwithstanding; *Provided also*, and it is hereby further declared, that any of the creditors of the said [*debtor*] shall be at liberty to execute these presents, without prejudice to any other lien or security which they respectively may have for his, her, or their debt or debts, or any part thereof, and also without discharging any other person or persons who might be liable as surety or sureties, or otherwise, to the payment thereof, any thing hereinbefore contained to the contrary thereof notwithstanding. *Provided also*, and it is hereby further agreed and declared, that no oneof the said creditors shall be entitled to receive any part or share of the estate and effects of the said [*debtor*], until such time as every such creditor shall first have made an affidavit, or, being a quaker, shall have made affirmation before one of the Masters ordinary or extraordinary of the High Court of Chancery, or before some justice of the peace, that

Indenture to be void if all the creditors except those of a certain amount do not concur by certain days.

Creditors may execute without prejudice to collateral securities.

Creditors to swear or affirm to debts, if required.

his debt is then justly due and owing, and shall produce and deliver such affidavit or affirmation to the said [*inspectors*], any thing hereinbefore contained to the contrary thereof notwithstanding (*d*); *Provided also*, and it is hereby declared, that every power and authority hereby committed or given to and vested in the said inspectors, may be exercised by any three or more of them (*e*); And it is further declared and agreed by and between the said parties to these presents, that if any of the said inspectors hereby appointed, or hereafter to be appointed, under this present provision, shall have been paid his or their whole debt or demand, debts or demands due and owing to them from the said [*debtor*] (*f*), or in case of the death of any one or more of them the said inspectors before the said —— day of ——, or in case any of them shall decline or become unable, on account of absence from the United Kingdom or personal infirmity, to act, then and in every such case, it shall be lawful for the major part of the creditors of the said [*debtor*], being parties hereto, or their respective executors or administrators, to be present at a meeting to be held pursuant to notice in the London Gazette for that purpose, to nominate and chuse such person or persons as they shall think fit, to be an inspector or inspectors in the place and stead of such inspector or inspectors as shall have been so paid their whole demand, or shall so die or decline or become unable to act; and every such person or persons so to be chosen as aforesaid, shall have the like powers, authority, and control, to all intents and purposes, as any of them the said inspectors hereinbefore named have, or can or may have, by virtue of these presents; *And further*, that in case a commission of bankrupt shall be awarded, issued, and prosecuted against the said [*debtor*], and in case, prior to the issuing thereof, any dividend or dividends of his estate shall have been made in pursuance of these presents amongst the creditors, parties

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Power of filling up vacancies in the inspectorship.

Proviso in case a commission of bankrupt shall issue against debtor.

(*d*) It is usual to provide that this shall be done on the requisition of the inspectors, and not at all events; some magistrates are reluctant to administer extra-judicial oaths of any kind, which it is clear they are not bound to do.

(*e*) This short clause prevents the necessity of adding the words "or any three of them," at every mention of the inspectors.

(*f*) This supposes the creditor to possess a collateral security.

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hereto, then and in such case the same creditors shall respectively come in and be admitted and considered as creditors under the said commission, for the whole of their respective debts now due and owing to them respectively from the said [*debtor*] (*g*), (save and except only what they may have received thereof otherwise than from the said [*debtor*] or his estate); and that what such creditors shall have received by virtue of these presents for a dividend or dividends upon their respective debts shall be considered and taken as so much received for dividends under such commission; And that, in case of the issuing of such commission, then the said creditors who are parties hereto shall give their respective consents to the allowance to the said [*debtor*] of the said 300*l.* a-year up to the time at which such commission shall be issued, and also of the several sums of money which the said [*debtor*] is, according to these presents, to be allowed out of the produce of his estate, for payments, charges, and expenses. And it is hereby likewise declared and agreed, that at the end of twelve calendar months, to be computed from the —— day of —— last, and so at the end of each succeeding twelve calendar months, or within ten days from each of the said respective times, a meeting shall be convened of the several creditors, at some convenient place within the city of ——, in order to peruse and examine the accounts of the inspectors for the time being, and also of the said [*debtor*] kept under their inspection during the then past year, in relation to the estate and effects of the said [*debtor*]; at which time and place the said [*debtor*], and also the said inspectors, or some person or persons to be by them properly authorized for that purpose, shall attend to give the said creditors assembled at such meeting a full, true, and particular account of all the receipts, payments, and transactions in relation to the estate and effects of the said [*debtor*], and otherwise give to the said cre-

Annual meetings of creditors to examine accounts of inspectors.

(*g*) But how could they state upon oath the whole to be due to them, if part had been paid by the receipt of a dividend under this deed? The clause (which is common in deeds of this nature), seems to be an attempt to place the creditors under the deed and commission on an equal footing. This, however, it does not completely effect, and not being obligatory on the commission creditors, who are not parties to the deed, had better be omitted.

ditors such satisfactory account as they shall be able, in relation to such estate and effects. And it is hereby declared and agreed, that the inspectors for the time being shall be indemnified out of the said [*debtor's*] estate, in respect of all transactions and personal engagements which they respectively shall, in pursuance of these presents, enter into with a view to the benefit of the said estate, or to facilitate a distribution thereof; and shall be answerable or accountable for their own respective acts and deeds only, and not for the acts and deeds of the others or other of them; and that the said inspectors shall be reimbursed out of the estate and effects of the said [*debtor*], all such costs, charges, and expenses as they shall respectively pay or be put unto in anywise concerning their acting as aforesaid in or about the premises. In witness, &c.

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Indemnities to inspectors.

HEADS *of* Agreement *between* Debtor *and* Creditors, *preparatory to the Execution of a more formal Instrument.*

PRELIMINARY AGREEMENT.

Agreement entered into this —— day of ——, Between [*debtor*], of &c., of the one part, and the several other persons whose names are hereto subscribed, being creditors of the said [*debtor*], of the other part: Whereas the said [*debtor*] is indebted to the several other parties hereto in various sums of money, which he is at present unable to satisfy. And whereas, at a meeting of the creditors of the said [*debtor*], convened for the purpose of taking into consideration the affairs of the said [*debtor*], held at ——, on this —— day of ——, it was resolved and agreed by the said creditors, parties hereto, that in order to render the estate of the said [*debtor*] available to the payment of his debts to the greatest possible extent, the affairs of the said [*debtor*] should be managed and wound up in manner hereinafter expressed; Now each of them the said parties hereto, in consideration of the stipulations entered

PRELIMINARY AGREEMENT.

into by the other and others of them, respectively, hereby agrees with the other and others of them in manner following, that is to say:—

Series of resolutions entered into by the creditors.

That the affairs of the said [*debtor*] relating to his said business of a merchant, shall be placed under the direction and superintendence of [*inspectors*], as inspectors for and on behalf of themselves and the said other creditors of the said [*debtor*].

That each of them the said parties shall and will forthwith execute a deed of covenant, letter of license, and deed of inspectorship, containing the covenants or stipulations following—

That the said [*debtor*] shall, within one calendar month from the date thereof, deliver to the said [*inspectors*] an inventory and account of all his credits, property, and effects (verified on oath if required); and that the said [*inspectors*] shall have free access to the books and accounts of the said [*debtor*], and shall, so far as they shall think proper to exercise the same, have the full superintendence and control over the concerns of his said trade or business.

That the said [*inspectors*] shall be at liberty, if they shall think proper, to employ the said [*debtor*] as their agent, either in their names or in his own name, in corresponding with the debtors of the said [*debtor*] in the West Indies and elsewhere, and in getting in and converting into money the credits and effects of the said [*debtor*], and to allow him such salary or compensation for his trouble and services therein, as they shall think proper.

That the said [*debtor*] shall exert his utmost endeavours speedily to collect and get in the said credits and effects, and as often as the monies in his hands shall amount to 50*l.*, or, at the option of the said inspectors, when the same shall amount to any less sum, shall pay such monies to the said [*inspectors*], who shall forthwith deposit the same in some banking-house in their joint names; and from time to time, when the sum so deposited shall amount to 500*l.*, or oftener, if required by any creditor or creditors, whose admitted demand or aggregate demands shall amount to the sum of 1000*l.* and upwards, shall distribute and didvie the same monies rateably among the creditors.

That the said [*debtor*] shall from time to time render to

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the said [*inspectors*] an account of the monies received by him, and unreservedly communicate to them all matters and transactions respecting his affairs.

That when, by the means aforesaid, the said creditors shall have been paid their demands in full, the residue (if any) of the monies and property in the hands of the said [*inspectors*], unapplied to the purposes aforesaid, shall be paid or delivered over to the said [*debtor*], and the powers vested in the said [*inspectors*] shall cease.

That when, by the means aforesaid, the whole of the present property and effects of the said [*debtor*] shall have been applied, so far as the same will extend in liquidation of the demands of the said creditors, the said creditors shall, on the request and at the costs of the said [*debtor*], execute to him a general release, absolutely discharging him from all such demands; and in the mean time, so long as the said [*debtor*] shall faithfully perform the stipulations so to be entered into by him as aforesaid, the said creditors shall not institute any proceedings at law or in equity against him for the recovery of their said demands.

That no surety for any debt of the said [*debtor*] shall be discharged by the effect of this agreement, or of the deed to be executed as aforesaid, any rule of law or equity to the contrary notwithstanding.

That the said deed so to be prepared for carrying into effect the objects of this agreement as aforesaid, shall contain a provision, making void the same in case any single creditor of the said [*debtor*] whose demand shall amount to 100*l.*, or any two creditors whose aggregate demands shall amount to 150*l.*, or any larger number of creditors whose aggregate demands shall amount to 200*l.*, shall not, within four calendar months from the date thereof, execute the said deed.

That the said deed shall contain a clause, authorizing the inspectors to pay the costs of preparing the same, and of or incidental to the present arrangements, and all the expenses incident to their said inspectorship, out of the monies which shall come to their hands.

That, in addition to the several resolutions and stipulations herein expressed, the said deed shall contain all other usual clauses; and if any question shall arise as to the propriety of any proposed clause or provision, the same shall

PRELIMINARY AGREEMENT.

be referred to the opinion of the senior King's counsel practising in the Court of Chancery, whose opinion thereon shall be conclusive. As witness the hands of the parties, the day and year above written.

ASSIGNMENT OF EFFECTS.

ASSIGNMENT *of the Debtor's* STOCK *in* TRADE, CREDITS, *and* EFFECTS (*a*), *to his largest Creditor, who engages to* PAY *to the other* CREDITORS *a* DIVIDEND *on their Debts. Perpetual* COVENANT *by Creditors* NOT TO SUE.

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*debtor*], of &c., of the first part; [*assignee credi-*

What conveyances amount to an act of bankruptcy.

(*a*) Here it will be useful to inquire what conveyances by a trader amount to an act of bankruptcy, within the meaning of the recent bankrupt act, 6 Geo. 4, c. 16, s. 3, which declares, that if a trader make, or cause to be made, within this realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels, or make or cause to be made any fraudulent surrender of any of his copyhold lands or tenements, or make or cause to be made, any fraudulent gift, delivery, or transfer of any of his goods or chattels, he shall be deemed to have committed an act of bankruptcy.

Remarks upon stat. 6 Geo. 4, c. 16, s. 3.

This enactment corresponds in substance with that of the repealed stat. 1 Jac. 1, c. 15, except that it embraces copyholds, to which the latter statute was held not to extend; *Ex parte Cockshott*, 3 B. C. C. 501; and also includes the *delivery or transfer* of chattels, whereas the decisions on the statute of James had confined it to conveyances by deed. *Rust* v. *Cooper*, Cowp. 633. There are two distinct grounds on which the conveyance of a trader has been held to be an act of bankruptcy. 1st, That of its being made under circumstances which render the act a fraudulent preference of any one creditor or more. 2nd, That of its comprising all the trader's property. In the first class of cases the invalidity or validity of the deed generally depends upon the question, whether the making of the conveyance has been spontaneous and voluntary on the part of the debtor, or induced by the threats or importunity of the creditor, amounting in construction of law to coercion. (*Vide Linton* v. *Bartlet*, 3 Wils. 47; *Devon* v. *Watts*, Doug. 86; and cases cited in

Fraudulent preference.

tor], of &c., one of the creditors of the said [*debtor*], of the second part; and all other the several creditors of the said

ASSIGNMENT OF EFFECTS.

Lord *Henley's* Bankrupt Law, p. 32): In regard to these cases it is obvious, that the circumstances which render the execution of the deed an act of bankruptcy, are wholly extrinsic, as no person framing such a conveyance would make an open avowal of the fraudulent design; and therefore purchasers and others deriving title under it, are not apprised by the deed itself of the infirmity of their title.

Conveyance by a trader of *all* his effects, held to be an act of bankruptcy.

The other species of grant, which amounts to an act of bankruptcy, is a conveyance of *all* the trader's property. The principle applicable to cases of this description is different from that which applies to the former. The vice of the transaction arises, not from the motive of the grantor, but from the crippled and destitute condition in which it places him, the effect of the conveyance being to strip him of all his property, and take it out of the operation of the bankrupt laws. And therefore it is unnecessary to inquire, in these cases, whether the conveyance is voluntary or compelled, or whether it is for the benefit of one creditor or more; the only material fact is, that it comprises the whole of the debtor's property. Thus, where A., a trader, who was in embarrassed circumstances, executed an assignment of all his property to a creditor to secure money then due, and also that which he was liable to pay on the assignor's account, which was stated indefinitely as being about 3000*l.* Possession was retained by A., and notice was not given to the persons owing the debts which were assigned by the deed, but a letter of attorney was given to a clerk of A. to receive the debts, &c.—It was held, that this deed was an act of bankruptcy. Lord *Mansfield*, C. J., after remarking that a trader might assign *part* of his effects to one particular creditor, proceeded to observe, that "an assignment of his whole estate is of a very different consideration: that tends to defeat the whole system of the bankrupt laws. Here he assigns all, and invests his own clerk with the management of his effects, instead of the commissioners. This deed is an act of bankruptcy itself. It defeats the whole bankrupt law: nothing remains for the creditors in any shape; but his whole estate is put into the hands of his own trustees immediately. Therefore he is of course a bankrupt the moment he has executed this deed: for there is nothing at all left for his creditors." *Wilson* v. *Day*, 2 Burr. 827.

Immaterial, that the property is not described as the whole estate.

It is to be observed, that a conveyance, which in point of fact embraces the entire property of the grantor, will be an act of bankruptcy, though the property be not described as the whole. Thus, if a trader has no other property than a freehold estate and a few credits, and he conveys these to a creditor, this conveyance, though not importing to embrace all his estate, would be an act of bankruptcy. *Ex parte Richardson*, 14 Ves. 184. But the instrument, if it does not profess to include the whole proper-

ASSIGNMENT OF EFFECTS.

[*debtor*], who have executed these presents, of the third part. WHEREAS the said [*debtor*] is indebted to the several

Recital that debtor stood indebted.

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ty of the trader, or at least that which the law considers (as we shall presently see) to be equivalent to the whole, contains no internal evidence of its being an act of bankruptcy, a point which is often of great importance to purchasers.

Colourable exception does not prevent the deed from being an act of bankruptcy.

However, a colourable exception will not take the conveyance out of the operation of the rule, and particular stress has been laid on the fact of its embracing the entire stock in trade of the assignor, the parting with which, it is considered, demonstrates and indeed produces, an incapacity to carry on his business. Thus, in the case of *Gayner*, cited 1 Burr. 477, who had made an assignment of all his effects, goods, stock in trade, and book debts, except household goods, watches, plate, bills of exchange, promissory notes, and cash then by him, and a parcel of ginger, in trust to pay the creditors mentioned in a schedule, which included all the creditors but one, Lord *Hardwicke* was of opinion that the execution of this deed was an act of bankruptcy.

So, in the case of *Law* v. *Skinner*, 2 Blackst. 996, where A., in consideration of 300*l.*, assigned to B. two leasehold messuages, and all his stock in trade by way of mortgage for the 300*l.* and interest; but his household goods and debts, both of which were very trifling, were not included in the assignment; and the question being, whether this deed was an act of bankruptcy, *De Grey*, C. J., asked whether it did not *ipso facto* create an insolvency in the trader? if so, it was clearly an act of bankruptcy, and void against creditors: "and I think," continued the learned Chief Justice, "it creates an insolvency. It is an assignment of all his stock in trade, without which he can carry on no business. It is all his substance except his household goods and debts, which alone were insufficient to discharge his incumbrances, and made him insolvent; and if the deed itself be an act of bankruptcy, the mortgage of the houses in the same deed is equally void and fraudulent."

Again, in the case of *Worseley* v. *De Mattos*, 1 Burr. 467, where A., in order to indemnify B., who acted as his agent and banker, assigned to B. a certain mill and other leasehold property, and also all his stock, utensils, and other things used by him in his trades of brewing and malting, and of a cornfactor and miller, and all other his goods and commodities belonging to or employed in the said several trades, defeazanced however on A.'s making good to B. all sums of money which he should advance, and indemnifying him concerning his agency. The deed also contained a covenant, that in case of failure of the conditions, it should be lawful for B. to enter upon the mill, &c., and also take to his own use the stock and other things. A. continued in possession. The deed comprised all his property which was of any value. B. paid various

persons, parties to these presents, whose names and debts are mentioned or referred to in the schedule hereto annexed, ASSIGNMENT OF EFFECTS.

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bills on A.'s account. The Court was clearly of opinion that the execution of the deed was an act of bankruptcy, on two distinct grounds: the one, because it was a conveyance of all the estate; and the other, because it was a preference of a particular creditor. "He could not," Lord *Mansfield* said, "stand a moment after his whole trade, fixed and fluctuating stock, and credits, were taken from him."

Conveyances by a trader held to amount to an act of bankruptcy.

So, in the case of *Hassel* v. *Simpson*, Cowp. 110; *S. C.* Doug. 89, n., where a trader covenanted to surrender a copyhold estate to a person who had joined with him as surety in a bond for 200*l.*, and also assigned to him all his household furniture, goods, chattels, stock in trade, and other personal estate, (except wearing apparel), subject to a proviso making the same void in case the assignor saved the assignee harmless by reason of the suretyship; but in case of default the latter was to enter upon the property, and also take the chattels. The question for the opinion of the Court of King's Bench, on a case from Chancery, was, whether this deed was an act of bankruptcy; which the Court without hesitation answered in the affirmative. Lord *Mansfield*—"A fraudulent disposition of a trader's property is void against his creditors; and, if it is done by deed, is by force of the statute of James still an act of bankruptcy: In the present case, the assignment is by deed, and what has the trader done by that deed? Why, to secure the defendant against the consequences of being surety for him, he conveys a copyhold estate, and also all his goods, furniture, stock, &c. to the defendant. He enumerates the goods specifically and in detail, and gives a sham possession by delivering a spoon. It has been settled over and over, that if a trader makes a conveyance of all his property, that is instantly an act of bankruptcy. It is fraudulent. It destroys the capacity of trading." See also *Eckhardt* v. *Wilson*, 8 Durn. & East, 142.

Observations on the cases.

The doctrine of the preceding cases has been generally and deservedly condemned. Looking at the terms of the statute of James, it was scarcely less than an act of legislation to declare that an assignment by a trader of *all* his effects for the equal benefit of *all* his creditors, was an act of bankruptcy. The reasoning, founded on the incapacity which it induces to carry on trade, is altogether *dehors* the statute, which contains not a word that points at any such principle. The enactment was evidently levelled against dispositions of property by which the claims of the creditors at large were intended to be evaded, and not those of which they were the objects, and which, so far from having the effect of "defrauding" or "delaying" creditors, placed the trader's whole property at their immediate disposal. But so firmly rooted has the doctrine become by repeated recognition, that it is now impossible, and would be mischievous, to disturb it. The Legislature itself has recognised the doctrine in the fourth sec-

ASSIGNMENT OF EFFECTS.

intitled "The First Schedule," in the several sums of money which are therein written opposite to their respective names,

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tion of the recent bankrupt act of 6 Geo. 4, c. 16, *ante*, p. 424, which provides, that a conveyance of all the effects for the benefit of all the creditors shall not be an act of bankruptcy in certain cases.

Conveyance executed in mistake, no act of bankruptcy.

If a conveyance of the entire property of a trader be executed in mistake, (the person who prepared it having misunderstood his instructions), it will not be an act of bankruptcy. Thus, where a person, being about to emigrate to America, gave to his solicitor instructions to prepare a power of attorney, enabling his son (to whom he was indebted) to sell his property and wind up his affairs; instead of which the solicitor prepared an assignment of all his stock in trade, debts, and personal estate, which the trader executed; and a commission afterwards issued founded on this deed as an act of bankruptcy; Lord *Eldon*, on a representation of these circumstances, superseded it, though the evidence of the solicitor seemed in some degree to contradict the depositions of the trader as to his ignorance of the nature of the deed; but the deed, his Lordship considered, did not conform to the instructions even as stated by the solicitor himself. *Ex parte Norris*, 1 Glyn & Jam. 233.

But it is no objection to the operation of the deed as an act of bankruptcy, that it was obtained by the creditors with a view of founding a commission on it, nor to the claims of the assignees under such commission, that they had concurred in the deed; for though a person cannot take out a commission founded on an act of bankruptcy committed by the execution of a deed, in which he has concurred, (*vide ante*, p. 425); yet the situation of an assignee is altogether different from that of a petitioning creditor; *he* (the assignee) is merely a trustee for the creditors, and not necessarily a creditor himself. *Tappenden* v. *Burgess*, 4 East, 230. Nor is it material that the deed contains a clause enabling the trustees to avoid it, if they think proper. Ib.

According to the principle of Lord *Mansfield's* reasoning in *Hassell* v. *Simpson*, and similar cases, a conveyance by a trader might amount to an act of bankruptcy, if it comprised that which was essential to the prosecution of his trade, though it does not embrace all or nearly all his property; but considering the view in which the doctrine of these decisions is now regarded, it is not likely that it will be carried farther. At all events, it is clear that a conveyance of all the freehold, copyhold, and leasehold estates of a trader, also possessed of considerable personal property, for any purpose not itself rendering the conveyance an act of bankruptcy, would not be held to be such. Thus, where a trader, who had lately dissolved partnership, executed a conveyance and assignment of all his freehold and leasehold estates, and a covenant to surrender copyholds (which constituted all his separate property *of this description*, but not the whole

Conveyance of all the freehold, copyhold, and leasehold estates of the grantor, not an act of bankruptcy.

ASSIGNMENT OF EFFECTS.

—Agreement for assignment by debtor, and acceptance of dividend by creditors.

and is also justly indebted to the said [*assignee creditor*] in the sum of £——, or thereabouts. And whereas the stock in trade, goods, wares, merchandizes, and effects mentioned and particularized in the schedule hereto underwritten, intitled the Second Schedule, and the several outstanding credits owing to the said [*debtor*], which are mentioned and set forth in the Third Schedule hereunder written, are all the goods, chattels, credits, and effects of or belonging to him the said [*debtor*], or wherewith he can satisfy or pay his several creditors, save and except his household goods and the wearing apparel and linen of himself and his wife; And inasmuch as a considerable length of time will be requisite, in the course of credit given in trade or otherwise, for the collecting and receiving the said credits, the said several creditors, and also the said [*debtor*], have proposed to the said [*assignee creditor*], who has the largest demand on the said [*debtor*], that an absolute assignment of the said stock in trade, and other things mentioned in the second schedule, and of all the said credits mentioned in the third schedule hereunder written, shall be made by the said [*debtor*] to the said [*assignee creditor*], for his own absolute use and benefit, without any ulterior trust for, or any interest whatever in the said [*debtor*], in or towards satisfaction of the said debt or sum of £——, so due and owing to him the said [*assignee creditor*] as aforesaid, upon the said [*assignee creditor*] entering into a covenant and giving such security to the creditors for payment to each of them of a composition or dividend of 12*s.* 6*d.* in the pound upon each of their respective demands, and in full satisfaction thereof, and to be paid at such respective times and in such manner as hereinafter expressed; to which proposal the said [*assignee creditor*] hath consent-

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of his effects, he having a large personal estate,) to trustees, to raise money by sale or mortgage for the use of the grantor, and especially to indemnify the trustees for liabilities which they might incur on his account; and the trader, in conjunction with his late partner, also executed a power of attorney to persons not creditors, empowering them to collect and receive the credits and effects of the partnership—it was held, that these acts did not constitute an act of bankruptcy. *Berney* v. *Davison*, 4 J. B. Moore, 126.

ASSIGNMENT OF EFFECTS.

ed and agreed. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the said sum of £——, so due and owing to the said [*assignee creditor*], as aforesaid, and which the said [*assignee creditor*] and [*partner*] do hereby acknowledge to be discharged by the assignment hereby made; And also, *(nominal consideration from assignee creditor to debtor)*, he the said [*debtor*], with the consent and by the direction and appointment of the said several creditors, parties hereto, testified by their respectively executing these presents, *Doth* by these presents grant, bargain, sell, assign, transfer, and set over unto the said [*assignee creditor*], his executors, administrators, and assigns, *All and singular* the stock in trade, goods, merchandize, and effects of him the said [*debtor*], mentioned and particularized in the schedule hereunder written; And also all and every the credits and sums of money owing to him the said [*debtor*], and which are mentioned and expressed in the third schedule hereunder written, be the same more or less than herein is specified; And all profits and produce thereof; And all the right, title, interest, benefit, trust, advantage, property, claim, and demand whatsoever of him the said [*debtor*] in or to the same several premises respectively; And all securities, accounts, vouchers, and proofs touching or concerning the same; TO HAVE, RECEIVE, TAKE, and enjoy all and singular the said premises mentioned to be hereby granted, bargained, sold, and assigned, with their appurtenances, unto the said [*assignee creditor*], his executors, administrators, and assigns, to and for his and their own use and benefit, And as and for his and their own monies, goods, chattels, and effects, from henceforth for ever: And, for the more effectually enabling the said [*assignee creditor*], his executors or administrators, to receive the several credits and sums of money hereby assigned, and the benefit of all securities for the same, the said [*debtor*] *Doth* by these presents make, constitute, and appoint the said [*assignee creditor*], his executors or administrators, to be the true and lawful attorney and attornies of him the said [*debtor*], his executors and administrators, for and in the name or names of him the said [*debtor*], his executors or administrators, or in the name or names of him the said [*assignee creditor*], his executors or adminis-

Testatum.

Debtor assigns to assignee creditor

all his stock in trade, and effects and credits, particularized in certain schedules.

Habendum.

Letter of attorney.

trators, to ask, demand, sue for, recover, and receive, of and from all the several persons liable to pay the same respectively, or whom else it may concern, all and singular the credits and sums of money hereby assigned or intended so to be, or any part or parts thereof respectively; and on receipt thereof, or of any part thereof, or on any agreement or composition respecting the same, or otherwise, to give and execute good and sufficient acquittances and discharges for the same; and generally, to make, do, and execute any other act, deed, matter, or thing whatsoever, for or in order to the recovering, receiving, and obtaining the payment of the several credits and sums of money aforesaid; And one or more attorney or attornies, under or in the room of him or them, for all or any of the purposes aforesaid, to substitute and appoint, and such substitution at pleasure to revoke. And the said [*debtor*] doth hereby give and grant unto the said [*assignee creditor*], his executors and administrators, and to his and their substitute and substitutes, the full and whole power and authority of him the said [*debtor*] over the premises; and doth hereby undertake, confirm, and allow to be valid and effectual and available, to all intents and purposes whatsoever, all and whatsoever the said [*assignee creditor*], his executors or administrators, or his or their substitute or substitutes, shall lawfully do or cause to be done in or about the premises, by virtue of these presents, the said [*assignee creditor*], his heirs, executors, or administrators, effectually saving harmless and keeping indemnified the said [*debtor*], his executors or administrators, from all losses and damages by reason of his or their name or names being used in any action or actions, or other proceedings, which shall or may be brought or instituted by the said [*assignee creditor*], his executors or administrators, or his or their substitute or substitutes, by virtue of the power and authority hereinbefore contained. AND THIS INDENTURE FURTHER WITNESSETH, that the said [*assignee creditor*], in consideration of the said assignment so made to him by the said [*debtor*] as aforesaid, doth hereby for himself, his heirs, executors, and administrators, covenant and agree with the said several parties of the third part respectively, their respective executors and administrators, that he the said [*assignee*

ASSIGNMENT OF EFFECTS.

Further *testatum.*

Assignee creditor covenants with the other creditors to pay them instalments.

ASSIGNMENT OF EFFECTS.

creditor] (*b*) shall and will, when and as soon as these presents shall be delivered or tendered to him, signed, sealed, and delivered by all the said creditors whose names are mentioned and set down in the first schedule hereunder written, and duly attested, sign and give to each of the said parties hereto of the third part respectively, or their respective executors, administrators, or assigns, promissory notes or bills of exchange for two equal instalments of 6*s.* 3*d.* in the pound on the amount of their said several debts, payable respectively at the end of five and eight calendar months from the date hereof, making together the aggregate dividend or sum of 12*s.* 6*d.* in the pound upon the whole of the said respective debts. AND THIS INDENTURE FURTHER WITNESSETH, that, in consideration as well of the assignment hereinbefore contained, by and on the part of the said [*debtor*], as of the covenant so as aforesaid entered into by the said [*assignee creditor*], the said several parties hereto of the third part, do hereby for themselves severally and respectively, and for their several and respective heirs, executors, and administrators, and not for the acts and deeds of the other or others of them, but each of them for himself only, his heirs, executors, and administrators; and also the said [*assignee creditor*], for himself, his heirs, executors, and administrators, *Doth* covenant and agree with the said [*debtor*], his executors and administrators, that they the said respective covenanting parties, or their respective heirs, executors, administrators, and assigns, shall not nor will, at any time or times thereafter, commence or prosecute any action or actions, suit or suits at law or in equity, against the said [*debtor*], his heirs, executors, and administrators, or make any attachment of or upon his or their estates or effects, for or by reason of any debt or debts now owing by the said [*debtor*] to them, any or either of them; And in case any or either of the said covenanting parties, their or any or either of their respective heirs, executors, administrators, or assigns, shall commence any such action, suit, or attachment, contrary to the true intent and

Further *testatum.*

Creditors covenant not to sue.

(*b*) Observe the difference between the covenant in this and the former precedent, *ante*, p. 520.

ASSIGNMENT OF EFFECTS.

meaning of these presents, that then and in such case, the said [*debtor*], his heirs, executors, or administrators, shall and may plead these presents as a general release in bar of all and every such actions, suits, or attachments (*c*). AND the said [*debtor*], for himself, his heirs, executors, and administrators, doth covenant and agree with the said [*assignee creditor*], his executors and administrators, by these presents, that he the said [*debtor*], his heirs, executors, or administrators, will not, at any time or times hereafter, receive or take into his or their possession any of the premises hereinbefore mentioned, or intended to be hereby bargained, sold, and assigned, or release, give up, or discharge the same or any part thereof, or any suit or action to be brought or commenced for the recovery thereof, without the consent in writing of the said [*assignee creditor*], his executors or administrators, first obtained in that behalf; nor do or commit, or suffer to be done or committed, any act, matter, or thing whatsoever, by means whereof the said [*assignee creditor*], his executors, administrators, or assigns, shall or may be hindered or obstructed in recovering or receiving and getting in all or any of the said credits, sum or sums of money and effects hereby granted, bargained, sold, and assigned, or intended so to be, to and for his and their own use and benefit; nor will revoke or in any manner make void the power hereby to him granted; but that, on the contrary, he the said [*debtor*], his executors and administrators, shall and will, at his or their own costs, on request to him or them made in that behalf, do, perform, and execute all such further and other lawful and reasonable acts, matters, things, deeds, or assurances whatsoever, relating to the premises, as by the said [*assignee creditor*], his executors or administrators, or his or their counsel learned in the law, shall be reasonably devised or advised and required to be done, for the better, more speedy, and effectual recovering, receiving, and getting in the effects and premises intended to be hereby granted, bargained, and

Covenant by debtor with assignee creditor.

(*c*) A proviso which this precedent contained, that nothing contained in it should discharge the assignee creditor from the payment of the bills and notes, has been omitted, because it seemed impossible to suppose such a perversion of the obvious intention, as would read a covenant not to sue A. for debts owing by him, in consideration of bills to be given by B., into a discharge of B. from the payment of those bills.

ASSIGNMENT OF EFFECTS.

sold or assigned, and every or any part thereof; And also, to give his assistance and use his best endeavours, when required, that the said credits and effects hereby granted, bargained, sold, and assigned as aforesaid, or intended so to be, may be speedily got in and received. *And lastly*, it is hereby agreed and declared to be the true intent and meaning of all and every the said parties hereto, that, in case any of the creditors of the said [*debtor*], whose respective demands shall amount to the sum of 20*l.*, shall not seal and execute these presents, and accede to the assignment hereby made, within the space of three calendar months from the day of the date of these presents, then and in such case, and from thenceforth, this present indenture, and every clause, matter, and thing herein contained, shall be absolutely null and void, to all intents and purposes whatsoever, to the end that the said [*assignee creditor*], and all other the creditors of the said [*debtor*], may have and be entitled to such remedy for recovering their said several and respective debts from the said [*debtor*], or out of his estate and effects, as they or any of them would have been entitled to if these presents had not been made. *Provided nevertheless*, and it is hereby declared, that this provision shall not invalidate, prejudice, or affect any of the acts, receipts, dealings, or transactions of the said [*assignee creditor*], his executors or administrators, under or by virtue of the powers and authorities herein contained; but that, in case this vacating proviso shall take effect, the said [*assignee creditor*], his executors, administrators, or assigns, shall and may, after reimbursing himself and themselves all costs and expenses attending the sale, conversion, and getting in of such part of the stock in trade, credits, and effects hereby bargained, sold, and assigned, or intended so to be, as shall then have been sold, converted, and got in, pay over the residue or balance in his or their hands of the monies arising therefrom, and also deliver up such part or parts thereof as shall not have been sold, converted, and got in, unto the said [*debtor*], his executors, administrators, or assigns, for his or their own absolute use and benefit. (*d*) IN WITNESS, &c. *(Usual reference to schedules.)*

Proviso, that, unless all the creditors concur within three months, deed shall be void.

(*d*) This deed will only require a common deed stamp. As to the stamp on deeds of this nature, *vide ante*, p. 217.

APPOINTMENT *and* RELEASE IN FEE *to* TRUSTEES *for* SALE, *executed by a* TRADER *preparatory to a* GENERAL ASSIGNMENT *for the* BENEFIT *of his* CREDITORS (*a*), *(subject to a subsisting Mortgage for a Term).*

APPOINTMENT AND RELEASE TO TRUSTEES FOR SALE.

THIS INDENTURE, made the —— day of ——, BETWEEN [*debtor*], of &c., of the one part; and [*three trus-* Parties.

(*a*) As a conveyance by a trader of all his effects is an act of bankruptcy, (*vide ante*, p. 550), it has been usual, where such a conveyance is executed for the benefit of creditors, to vest the real property in trustees for sale by a separate instrument, bearing date a day or two before the creditors' deed, by which means purchasers may derive their title under it, without being affected with notice of the general assignment, all reference thereto being carefully avoided in the previous deed. This contrivance, of course, does not prevent the execution of the several instruments from amounting to an act of bankruptcy, though it places purchasers in the comparatively advantageous situation of persons without notice, and entitled, therefore, to the protection which the bankrupt statutes have thrown around such persons against latent acts of bankruptcy, (*vide ante*, Vol. 7, p. 389). Where the nature of the conveyance brings it within the 4th section of the act of 6 Geo. 4, c. 16, (*ante*, p. 424), instead of resorting to the expedient in question, it would in general be better to execute the deed according to that statute, and wait until the lapse of the six months, when, by the operation of the statute, it becomes unimpeachable; though it will be remembered that the enactment requires that the deed should be for the benefit of *all* the creditors; so that if it contains a clause (as such deeds frequently do), that creditors not executing by a specified time shall be excluded from the benefit of the trust, it is not within the statutory protection.

Remarks upon the precedent in the text.

The inconvenience attending titles derived under conveyances in trust for sale, similar to that in the text, is, that the deed is merely voluntary; and it appears that the introduction of a trust for the payment of debts simply, or such debts as the trustees might choose to pay, which is sometimes done as one of the modes of avoiding the necessity of referring

APPOINTMENT AND RELEASE TO TRUSTEES FOR SALE.

Recital of mortgage by appointment for 500 years.

tees], of &c., of the other part; *(Recite indenture of feoffment by which certain hereditaments, by a particular description, were conveyed to the debtor to uses to prevent dower):* AND WHEREAS, by indenture bearing date on or about the —— day of ——, 18—, and made or expressed to be made between the said [*debtor*], of the one part; and [*mortgagee*], of the other part; All those the said —— and hereditaments hereinbefore described, with their appurtenannces, were appointed and demised by the said [*debtor*] unto the said [*mortgagee*], his executors, administrators, and assigns, to hold from the day next before the day of the date of the indenture now in recital for the term of five hundred years thence next ensuing, without impeachment of or for any manner of waste, subject nevertheless to a proviso for redemption upon payment by the said [*debtor*], his heirs, executors, or administrators, unto the said [*mortgagee*], his executors, administrators, or assigns, of all and every sum and sums of money which were then due to the said [*mortgagee*], or which he should or might at any time or times thereafter lend and advance to the said [*debtor*], or to or for or upon his order or to his use, with lawful interest for the same from the time or respective times of advancing or lending the same, up and home to the day or respective days of the payment thereof, without any deduction or abatement whatsoever, such security being for a sum not exceeding 3000*l.*; and a power of sale was given to the said [*mortgagee*] in such manner as in the same indenture is mentioned; AND WHEREAS there is now owing from the said [*debtor*] to the

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to the assignment, would not divest it of its voluntary character; for it has been decided, that a conveyance for the payment of debts, but notexecuted by or made with the privity of any creditor, is merely voluntary, the trust for the creditors being considered as a mode of disposition for the benefit of the debtor himself; *Wallwyn* v. *Coutts*, 3 Mer. 707; *S. C.* 3 Sim. 14; *Page* v. *Broom*, 4 Russ. 6; and this principle is not varied by the circumstance of the debts being scheduled. *Garrard* v. Lord *Lauderdale*, 3 Sim. 1. On the other hand, in an early case, the claim of a purchaser with notice was not allowed to prevail against those of creditors under such a deed; *Langton* v. *Tracey*, 1 Ch. Rep. 33; and certainly, no purchaser could be advised to accept a title in opposition to and after notice of such a conveyance.

said [*mortgagee*] a considerable sum of money, by virtue of the hereinbefore recited indenture of mortgage, on the balance of an unsettled account. AND WHEREAS the said [*debtor*] is desirous of converting into personal property the said several —— and hereditaments comprised in the said hereinbefore recited indentures of feoffment and mortgage, as far as he is now interested therein; And also all others (if any) the messuages, lands, tenements, and hereditaments, of which he is now seised, or to which he is entitled for any estate of inheritance or of freehold only. NOW THIS INDENTURE WITNESSETH, that, in order to carry the said hereinbefore recited intention of the said [*debtor*] into effect, and in consideration [*nominal consideration*], he the said [*debtor*], by virtue and in execution of the power or authority given or reserved to him by the hereinbefore recited indenture of feoffment, and of all and every other power and powers, authority and authorities enabling him the said [*debtor*] in this behalf, doth by this his deed or instrument in writing, signed, sealed, and delivered by him in the presence of and attested by two credible witnesses, direct and appoint that the said several —— and hereditaments hereinbefore described, and all other the hereditaments hereinafter mentioned and hereby released, or intended so to be, as far as the same are subject to any such power or powers, with their and every of their appurtenances, shall henceforth remain, continue, and be TO THE USE of the said [*three trustees*], their heirs and assigns for ever, (subject nevertheless to the said term of five hundred years created by the hereinbefore recited indenture of mortgage, and the principal and interest monies now owing by virtue thereof, and also to such other charges and incumbrances, if any, as now affect the same premises or any part thereof), Nevertheless, Upon the trusts, and for the intents and purposes hereinafter declared concerning the same. AND THIS INDENTURE ALSO WITNESSETH, that, for the purposes aforesaid, and in consideration *(nominal consideration)*, he the said [*debtor*] (by way of further assurance) *Doth* by these presents grant, bargain, sell, release, ratify, and confirm unto the said [*three trustees*], their heirs and assigns for ever, (in the actual possession, &c.), ALL THOSE —— and hereditaments hereinbefore described and comprised in the

APPOINTMENT AND RELEASE TO TRUSTEES FOR SALE.

—That debtor is desirous of converting his real estate.

Testatum.

For a nominal consideration, debtor appoints to trustees in fee.

(Subject to mortgage term and other incumbrances, if any).

Upon the trusts hereinafter declared.

Further *testatum.*

For nominal consideration, debtor releases to trustees

certain lands and all other

APPOINTMENT AND RELEASE TO TRUSTEES FOR SALE.

hereinbefore recited indentures of feoffment and mortgage respectively; And also all other the freehold messuages, farms, lands, tenements, and hereditaments, situate in England or elsewhere, of which he the said [*debtor*] is now seised, or to which he is entitled, either in possession, reversion, remainder, or expectancy, either for an estate in fee-simple or any other estate of freehold or inheritance; And all houses, &c.; and the reversion, &c.; and all the estate, &c.; and all deeds, &c.; To HAVE AND TO HOLD the said —— and hereditaments hereby released, or intended so to be, with their appurtenances (subject nevertheless to the said term of five hundred years created by the hereinbefore recited indenture of mortgage, and to the principal and interest monies now owing by virtue thereof, and also to such other charges as now affect the same or any part thereof), UNTO AND TO THE USE of the said [*three trustees*], their heirs and assigns for ever, or for such other estates of inheritance and freehold respectively, as the said [*debtor*] now hath therein respectively, Nevertheless, upon the trusts, and for the intents and purposes hereinafter declared concerning the same; AND it is hereby expressly declared and agreed by and between the parties hereto, that the said [*three trustees*], their heirs and assigns, shall henceforth stand seised of the said —— and hereditaments hereby assured, with their appurtenances, subject as aforesaid, *Upon trust*, that they the said [*three trustees*], and the survivors and survivor of them, or his heirs, of their or his own proper authority, and without any further consent or concurrence of the said [*debtor*], his heirs, executors, administrators, or assigns, do and shall, as soon as conveniently may be after the execution of these presents, make sale and absolutely dispose of the said —— and hereditaments hereby assured, with their appurtenances, either altogether and in one lot, or by parcels and in several lots, and either by public auction or private contract, or partly by public auction and partly by private contract, as they or he in their or his discretion shall think fit, with liberty to purchase in the same at any auction or auctions, or rescind or vary the terms of any contract or contracts for sale which shall have been entered into, if it shall be deemed expedient so to do, and convey the same hereditaments when sold to the person or persons who shall

hereditaments belonging to the debtor, for an estate of inheritance or freehold.

General words.

Habendum

(Subject to mortgage term)

to the use of trustees in fee, or for other estate of freehold.

Declaration of trusts.

Immediate trust for sale.

APPOINTMENT AND RELEASE TO TRUSTEES FOR SALE.

agree to become the purchaser or purchasers thereof, and his, her, or their heirs and assigns, or in such other manner as he or they shall direct or appoint; *And upon this further trust*, that they the said [*three trustees*], and the survivors and survivor of them, and the heirs of such survivor, do and shall, by, with, and out of the clear rents and profits (if any) of the said messuages and hereditaments hereby assured, which shall be received by them and him respectively, and also the money which shall arise by or from such sale or sales respectively, in the first place deduct and retain to and for themselves and himself respectively, the costs, charges, and expenses of and attending the execution of the trusts hereby reposed in them and him, and the money which they and he respectively shall disburse for taxes or repairs, or insurance, if any shall be made, of the buildings of the said premises, or in or about any suit or suits at law or in equity, for obtaining the possession of the premises or any of them, or carrying the said trusts into execution, and enforcing the performance of any contract or contracts with any person or persons who shall agree to become the purchaser or purchasers of the said —— and hereditaments, or any of them; And then *Upon trust*, to discharge the said mortgage debt owing to the said [*mortgagee*] as aforesaid, and all other like charges and incumbrances affecting the said —— and hereditaments respectively, out of the money arising from the hereditaments respectively so charged, and to pay the residue or surplus which shall then remain in their or his hands unapplied to any of the purposes aforesaid, unto the said [*debtor*], his executors, administrators, and assigns, as part of his personal estate, so that the said —— and hereditaments may, as between the said [*debtor*], his heirs, executors, and administrators, be fully and completely discharged from its character of being real estate. And *it is hereby declared and agreed* by and between the parties to these presents, and the said [*debtor*], for himself, his heirs, executors, administrators, and assigns, doth hereby direct and appoint that it shall be lawful for the said [*three trustees*], or the survivors or survivor of them, or his heirs, to examine, settle, and adjust the said unsettled account existing between the said [*mortgagee*] and the said [*debtor*] as hereinbefore recited,

Application of rents and purchase monies.

To discharge mortgage debt.

Ultimate trust of residue for debtor.

Power of trustees to settle account with mortgagee.

APPOINTMENT AND RELEASE TO TRUSTEES FOR SALE.

and bring the same to a balance, and by and out of the monies which shall come to the hands of the said [*three trustees*], or the survivors or survivor of them, or his heirs, by virtue of the trusts hereinbefore contained, to pay to the said [*mortgagee*], his executors, administrators, or assigns, such sum or sums of money as shall appear to the said trustees or trustee to be due and owing to him or them, upon or by virtue of the hereinbefore recited mortgage security; *And further*, that the purchaser or purchasers of the said —— and hereditaments hereby assured, or any other person or persons paying to the said [*trustees*], or the survivors or survivor of them, or his heirs, any sum or sums of money, shall not be obliged or required to see to the application of the money to be advanced or paid by him, her, or them respectively, nor be answerable or accountable for the misapplication or non-application of the same; And that every sale which shall be made, and conveyance which shall be executed by the said [*three trustees*], and the survivors and survivor of them, or his heirs, shall be binding and conclusive on the said [*debtor*], his heirs, executors, administrators, and assigns; And the said [*debtor*], for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said [*three trustees*], their heirs and assigns, That, notwithstanding any act, deed, matter, or thing whatsoever, made, done, or executed, or knowingly suffered to the contrary by the said [*debtor*] (*b*), (except as

Trustee's receipts to discharge purchasers.

Sales to be binding on debtor.

Covenants by grantor that he is lawfully seised.

Remarks as to the extent of the covenants.

(*b*) Here the covenants are restricted to the acts of the grantor, which seems to be correct; because a purchaser from the trustees ought not to stand in a better situation in regard to covenants for title than a purchaser from the grantor himself, who, it is well known, would, by the general rule, have no claim to absolute covenants. In this view it has always appeared to the Editor, that the absolute covenants usually inserted in a mortgage deed containing a power of sale, are objectionable, as creating, by the advantage they confer on purchasers under the power, in regard to the point in question, an anomalous exception to the general rule. The plea in favour of absolute covenants in such cases is, that they enable a mortgagee to recover damages for a breach of covenant, if the title should prove to be defective, without waiting for the arrival of the period appointed for the payment of the mortgage money; but this difficulty might be obviated, by making the money payable immediately

hereinafter is excepted), he the said [*debtor*] is now lawfully seised to him and his heirs of an absolute and indefeasible estate of inheritance in fee-simple, or hath a good and valid power over the fee-simple of, in, and to the said —— and hereditaments hereinbefore described and hereby assured, or intended so to be, with their appurtenances, without any condition, trust, entail, power of revocation or of limitation to use or uses, or any other power, restraint, or thing whatsoever, to alter, revoke, make void, incumber, or determine the same estate, or any part thereof; *And also*, that, notwithstanding any such act, deed, matter, or thing as aforesaid, the said [*debtor*] now hath in himself full power and absolute authority to release, appoint, and assure the said —— and hereditaments hereby assured or intended so to be, with their appurtenances, unto and to the use of the said [*three trustees*], their heirs and assigns, in manner aforesaid, according to the true intent and meaning of these presents; *And that*, notwithstanding any such act, deed, matter, or thing as aforesaid, the same —— and hereditaments shall and may be peaceably and quietly held and enjoyed, and the rents and profits received and taken accordingly, without any eviction or interruption whatsoever of or by him the said [*debtor*], or any other person or persons lawfully claiming by, from, under, or in trust for him or them; And free and clear, and absolutely released and for ever discharged, or otherwise, by him the said [*debtor*], or his heirs, executors, or administrators, effectually saved and kept harmless and indemnified of, from, and against all and all manner of former and other assurances, estates, titles, charges, and incumbrances whatsoever, at any time or times heretofore, and to be at any time, and from time to time hereafter, created, occasioned, or suffered by him the said [*debtor*], his heirs, executors, or administrators, or any other person or persons lawfully claiming by, from, under, or in trust for him or them, or by his, their, or any or either of their acts, means,

APPOINTMENT AND RELEASE TO TRUSTEES FOR SALE.

And that he has power to convey.

—For quiet enjoyment.

Free from incumbrances.

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on the discovery of a defect of title, which would certainly be more consistent with the general practice as to vendors' covenants for title, than to subject the mortgagor to the unrestricted liability incident to absolute covenants.

APPOINTMENT AND RELEASE TO TRUSTEES FOR SALE.

(Except as recited).

And for further assurance.

consent, privity, or procurement, (except as appears or is recited in these presents); *And moreover*, that he the said [*debtor*], and his heirs, and all persons whosoever lawfully claiming any estate, right, title, trust, charge, or interest, at law or in equity, of, in, to, or out of or upon the said —— and hereditaments hereby released, or intended so to be, by, from, under, or in trust for him or them (other than and except the person or persons whose estate or interest, or several estates or interests is or are hereinbefore excepted), shall and will from time to time, and at all times, upon every reasonable request, and at the costs and charges (*c*) of the said [*three trustees*], their heirs and assigns, make, do, acknowledge, levy, suffer, execute, and perfect, or cause to be made, &c., all such further acts, deeds, conveyances, and assurances in the law whatsoever, either by fine, common recovery, or otherwise, for more effectually releasing, or otherwise assuring the said —— and hereditaments hereby released or intended so to be, with their appurtenances, unto and to the use of the said [*three trustees*], their heirs and assigns, for such estates as are hereby expressed or intended to be appointed, granted, or released therein respectively, according to the true intent and meaning of these presents, as by the said [*three trustees*], their heirs or assigns, or their counsel in the law, shall be reasonably devised or advised and required, and be tendered to be made, done, and executed. IN WITNESS, &c.

(*c*) The draft from which the precedent in the text was taken, provided that the further assurances to be executed under the covenant should be at the cost of the trust estate, and also that the assurances should be upon the trusts before declared; but both these clauses have been expunged, because they were applicable only to the state of facts existing antecedently to a sale under the trust; though it is obvious, that, even after this event, the covenant would have a continuing operation. The present form is applicable to both periods.

ASSIGNMENT *of the* PERSONAL ESTATE *of a* TRADER, *including* MONIES *to* ARISE *from the* SALE *of his* REAL ESTATE *(which is conveyed by the last Precedent) to* TRUSTEES, UPON TRUSTS, *for the* BENEFIT *of his* CREDITORS. COVENANT *to* ASSIGN SHARES *of* VESSELS. LETTER *of* ATTORNEY, *and other* USUAL CLAUSES.

ASSIGNMENT OF PERSONAL ESTATE.

THIS INDENTURE, made the —— day of ——, BETWEEN [*debtor*], of &c., of the first part; [*three trustees*], of &c., of the second part; and the several other persons, creditors of the said [*debtor*], who have subscribed their names and affixed their seals to these presents, of the third part. WHEREAS the said [*debtor*] is justly indebted unto the several persons, parties hereto of the second and third parts, in several sums of money, and is not prepared to answer the debts which are due from him as aforesaid. AND WHEREAS it was lately proposed and agreed by and between all the said parties to these presents, that the said [*debtor*] should convey, assign, and assure all his estate and effects unto the said [*trustees*], *Upon trusts* for the benefit of the creditors of the said [*debtor*], in manner hereinafter expressed. AND WHEREAS, by indentures of lease and appointment and release, bearing date respectively the day next but one before, and the day next before, the day of the date of these presents, respectively, made between the said [*debtor*], of the one part, and the said [*trustees*], of the other part, the said [*debtor*] did convey and assure unto the said [*trustees*] certain freehold lands and hereditaments therein described, situate at ——; And also, all other the freehold hereditaments and premises of the said debtor, situate in England or elsewhere, with their appurtenances, To hold the same (subject to a certain mortgage term of five hundred years, created for securing certain monies, not exceeding £—— and interest,) unto and to the use of the said trustees, their heirs and assigns for ever, or for such other estates of inheritance

Parties.

Recital of the debtor being indebted.

—Agreement for present deed.

—Conveyance of real estate.

ASSIGNMENT OF PERSONAL ESTATE.

and freehold respectively as the said [*debtor*] then had therein, Upon trust to sell the same, and by and out of the monies arising from such sale or sales, and also the rents and profits of the said hereditaments, to pay the costs and expenses of carrying the said trusts into execution, and also of discharging the said mortgage debt and all other like charges and incumbrances affecting the said hereditaments, and to pay the residue or surplus unto the said [*debtor*], his executors, administrators, or assigns, as personal estate. AND WHEREAS the hereinbefore recited indentures were executed by the said debtor at the instance and request of his said several creditors, parties hereto; and in order and to the intent that the residue or surplus of the monies arising as well from the rents and profits as from the sale of the said freehold hereditaments, and which, under or by virtue of the hereinbefore mentioned trusts, was to be paid or payable to the said [*debtor*] as aforesaid, should be assigned in and by these presents, together with the rest of the personal estate and effects of the said [*debtor*], upon the trusts hereinafter declared. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and *(nominal consideration)*, he the said [*debtor*], at the request and by the direction, and on the nomination of the said several persons parties hereto of the third part, testified by their severally executing these presents, *Doth*, by these presents, bargain, sell, assign, transfer, and set over unto the said [*trustees*], their executors, administrators, and assigns, All and singular the household goods, books, credits, furniture, stock in trade, bonds, bills, and securities for money, bottomry bonds, leases for years, and all other the personal estate and effects now belonging, due, or owing to him the said [*debtor*] (the necessary wearing apparel of the said [*debtor*] and his family only excepted); And also all the balance and surplus (if any) of the produce or money which (after payment and satisfaction of all expenses, and discharge of the mortgages and other incumbrances affecting the same) shall or may become due and payable to the said [*debtor*], or belong to him, on the sale of his freehold property, which hath been conveyed to and vested in the said [*trustees*] by the hereinbefore recited indentures of lease and appointment and release; And all the right, title, and interest, trust, possession, property,

—Of agreement respecting the recited conveyance.

Testatum.

Debtor, by the direction of creditors, assigns to trustees,

All his household furniture and other effects;

And all the right, &c.

claim, and demand whatsoever, at law and in equity, of him the said [*debtor*], of, in, to, out of, or upon the same goods, effects, and property respectively; Together with all books, writings, deeds, bills, notes, and receipts, papers and vouchers touching the same or any part thereof; TO HAVE, RECEIVE, TAKE, AND ENJOY the said goods, chattels, stocks, monies, credits, bonds, bills, securities for money, bottomry bonds, and all and singular other the premises hereinbefore assigned, or intended so to be, unto the said [*trustees*], their executors, administrators, and assigns, henceforth for ever, as their own proper goods, chattels, and effects; Upon the trusts, nevertheless, and for the several intents and purposes hereinafter expressed concerning the same. AND the said [*debtor*] doth hereby, for himself, his heirs, executors, and administrators, covenant, declare, and agree with and to the said [*trustees*], their executors and administrators, that he the said [*debtor*], his executors or administrators, shall or will forthwith, at the costs and charges of the said trust estate, assign to the said [*trustees*] All and singular the ships and vessels, and parts of ships and vessels of him the said [*debtor*], which are under or subject to British registry (*a*), and to be held upon, under, and subject to the trusts hereby declared of and concerning the goods and other effects hereby assigned, or intended so to be; or otherwise, that he the said [*debtor*], his executors or administrators, shall or will, on or before the —— day of —— now next ensuing, by and under the inspection and superintendence of the said [*trustees*], or of the survivors or survivor of them, his executors or administrators, sell, dispose of, and convert into money the same ships and vessels, or parts of ships and vessels so being under and subject to British registry, and permit and suffer the produce thereof to be received by the said [*trustees*], their executors and administrators, Upon the trusts, and for the intents and purposes, and under and subject to the powers, provisoes, declarations, and agreements hereinafter expressed concerning the money to arise from the goods and other personal estate hereby assigned, or intended so to be. AND, for effectuating the assignment hereinbefore made, he the said

ASSIGNMENT OF PERSONAL ESTATE.

—Together with all books, &c.

Habendum.

Covenant by debtor to assign vessels, and shares of vessels belonging to him.

Or otherwise to sell them, and permit the produce of the sale to be received by the trustees.

Letter of attorney, authorizing trustees to receive credits, &c.

(*a*) As to the transfers of vessels, *vide ante*, Vol. 6, p. 166.

ASSIGNMENT OF PERSONAL ESTATE.

[*debtor*] Doth, by these presents, constitute and appoint the said [*trustees*], and the survivors and survivor of them, and the executors or administrators of such survivor, to be the true and lawful attornies and attorney of him the said [*debtor*], his executors or administrators, in the name or names of the said [*debtor*], his executors or administrators, or otherwise, and at the costs and charges of the said trust estate, to ask, demand, sue for, recover, and receive of and from all and every person and persons who is, are, or shall be debtor or debtors to the said [*debtor*], on any account whatsoever, or from any or either of the same persons, or whom else it may concern, all and every sum and sums of money which now are or is due or owing, or shall become due or owing, to him the said [*debtor*] as aforesaid; and, on receipt thereof, or on any agreement or composition respecting the same, to give and execute good and sufficient receipts, releases, acquittances, or other discharges, for all or any part of the same sum and sums of money, and generally, to make, do, and execute any act, deed, matter, or thing whatsoever, for the purpose of recovering and obtaining payment of the sum and sums of money, or the possession or delivery of the goods, chattels, and effects hereby assigned or intended so to be; And one or more attorney or attornies, under or in the room of him or them, for all or any of the purposes aforesaid, to substitute and appoint, and such substitution from time to time at pleasure to revoke. And the said [*debtor*] doth hereby give and grant unto the said [*trustees*], and to the survivors and survivor of them, and the executors or administrators of such survivor, and to their and his substitutes and substitute, the full and whole power and authority of him the said [*debtor*], over the premises; and doth hereby undertake to ratify and confirm whatsoever they or he shall lawfully do or cause to be done by virtue of the power or authority hereinbefore contained. And it is hereby declared and agreed, that the said [*trustees*], and the survivors and survivor of them, and the executors or administrators of such survivor, shall stand and be possessed of all and singular the said stock, chattels, credits, bonds, bills, securities for money, and money, and other effects hereinbefore assigned or intended so to be; *Upon trust*, that the said trustees or trustee do and shall, with all convenient speed, sell and dis-

Power of appointing substitutes.

Declaration of trusts.

Trust for sale, conversion, and getting in, of the estate.

pose of the said stock, chattels, and effects, being in their nature saleable, either by public sale or private contract, for the best price that can or may be reasonably had or gotten for the same; and as to such goods and effects as are in parts beyond the seas, either for ready money or for credit, or for bills of exchange, or produce to be remitted to this country, as shall be deemed most beneficial (*b*); and do and shall receive, collect, and get in all and singular the credits and sums of money hereby assigned or intended so to be; and, for the purpose of such sale, do and shall, if he or they shall think fit, send or consign to persons beyond the seas all such goods and chattels as, in the discretion of the trustees or trustee for the time being, will be sold to most advantage in parts beyond the seas; and do or shall, if they or he shall think fit, bring or order to this country, or to any other place or places, such of the said goods and chattels as are in parts beyond the seas, and as may be sold to greater advantage at any other different place; and do and shall, by and out of the money to arise by such sale or sales, and to be received or collected as aforesaid, In the first place, deduct and retain to themselves and himself, all salaries of clerks and agents, and all such other costs and expenses as they respectively shall or may sustain, expend, or be put unto, in or about preparing these presents, and procuring the execution of the same, and of the hereinbefore recited conveyance of the said freehold estate, and otherwise incident thereto; and also, all costs, charges, and expenses attending the suing out by the said [*one of the trustees*] of a commission of bankrupt against the said [*debtor*], which has not been prosecuted; and all costs and expenses attending the subsequent investigation and arrangement of the affairs of the said [*debtor*], and the obtaining the consent of his said several creditors thereto, and to join in and execute these presents, and all disbursements whatsoever incident thereto, and other the costs, charges, and expenses incurred by them the said [*trustees*], or any or either of them, in defending

ASSIGNMENT OF PERSONAL ESTATE.

Application of the monies arising from the sale and conversion.

(*b*) This clause would impliedly negative the trustee's power to accept bills of exchange for goods sold *at home;* which implication, therefore, should be repelled by a declaration to the contrary, if such be the intention.

ASSIGNMENT OF PERSONAL ESTATE.

actions brought or to be brought against the said [*debtor*]; and also the expenses incident to the sale and disposal of the chattels and effects hereby assigned, or to the collecting in or receiving of the credits, by employing an agent to sell, dispose of, or collect the same at the usual commission, or otherwise; and in or about the execution of the several trusts hereby in them and him reposed, or otherwise howsoever relating thereto; And after payment and satisfaction of the same, then *Upon trust* that the said trustees or trustee for the time being do and shall apply all the money which shall be received under or by virtue of the trusts hereinbefore declared, in payment of all the debts and sums of money owing by the said [*debtor*] to such of his creditors as shall have executed these presents, rateably and in proportion to the amount of the debts or sums of money owing to them respectively, and without any priority or preference of any one or more of them to the others or other of them, until each of the same creditors respectively, or his or her executors or administrators, shall have received the full amount of the debt owing to him, her, or them respectively; And do and shall pay the residue and surplus (if any) of the said money and produce to the said [*debtor*], his executors, administrators, or assigns, for his or their own use and benefit, or as he or they shall direct. *Provided always*, and it is hereby declared and agreed, that, in case there shall be any sum or sums of money owing by the said [*debtor*], on bills or otherwise, which are not yet become payable, the trustees or trustee for the time being shall pay the same sums of money, or a dividend thereon, on being allowed discount or rebate for the acceleration of payment, in the same manner as if the said sum or sums had been proved or claimed under a commission of bankrupt. And it is hereby declared and agreed, that it shall be lawful for the said trustees or trustee, if they or he shall think proper, and out of the first money which shall come to their or his hands by virtue of these presents, after paying thereout all such costs, charges, and expenses as are hereinbefore directed to be raised and paid, to deliver from any extent or execution, or to purchase in any part of the furniture, goods, and chattels of the said [*debtor*], which are, or from time to time shall or may be taken in execution, and hold the same furniture, goods, and

Rebate of interest to be allowed on debts not yet payable.

Power to trustees to pay monies in discharge of an extent or execution.

chattels, upon, under, and subject to the trusts hereby declared of and concerning the same; *And further*, that it shall be lawful for the said trustees and trustee, (if they or he in their or his uncontrolled discretion shall think proper, but not otherwise), by and out of the first monies which shall come to their or his hands by virtue of these presents, and after paying thereout all such costs, charges, and expenses as are hereinbefore directed to be raised and paid, to pay all or any one or more of the creditors of the said [*debtor*], whose claims respectively do not exceed the sum of 10*l.*, the full amount of such claims, so as to supersede the necessity of their concurrence in these presents, or of receiving any dividend under the same; And that it shall be lawful for the trustees or trustee for the time being, in their or his discretion, and on account of the general creditors entitled to the benefit of the said trust estate, to settle and agree with any of the creditors of the said [*debtor*], whose respective claims amount to upwards of 10*l.*, to make them such payment or compensation for the same, by way of composition, as they may respectively agree to accept; and if, in the opinion of the trustees or trustee for the time being, it shall be for the benefit of the trust estate, then to pay any such creditors as last mentioned the full amount of the sums of money owing to them respectively, so as in either of the said cases the sum so paid do not exceed the sum of 50*l.*; *And further*, that, if at any meeting of the creditors to be convened for the purpose, by fourteen days' notice in the London Gazette, it should be deemed expedient by the major part in value of the creditors present at such meeting, including, among such creditors, the trustee or trustees for the time being, who shall be a creditor or creditors under these presents, that the provision lastly hereinbefore contained shall be determined, and shall subscribe a resolution in writing to that effect, then and in that case, and thenceforth, the same provision shall cease and be void accordingly, to all intents and purposes whatsoever, without prejudice to any composition or agreement previously made under or by virtue of the same provision. *And* it is hereby declared, that all claims of the said creditors of the said [*debtor*] as aforesaid shall be verified and proved by the affidavit of the several creditors, stating the amount and consideration of the same, to be sworn before a Master

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To pay debts under 10*l.* in full.

Also to pay or compound for debts of a larger amount, subject to a certain limit.

Last power may be revoked by a majority of the creditors, at a meeting convened for that purpose.

Creditors' demands to be verified on oath, if required.

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or Master Extraordinary in Chancery, or a magistrate of the county or district in which the party shall reside, if the trustee or trustees for the time being, or any three or more of the creditors, whose aggregate admitted claims shall amount to the sum of £—— or upwards, shall require the same; *And further*, that it shall be lawful for the said trustees or trustee for the time being to admit any person or persons, a creditor or creditors, under or by virtue of these presents, for any sum or sums of money claimed by him, her, or them from the said [*creditor*], on such evidence as such trustees or trustee shall think reasonable; *And also*, that, notwithstanding any thing hereinbefore contained, the trustees or trustee for the time being shall or may compound any sum or sums of money owing or claimed to be owing to the said [*debtor*], or accept part thereof or a security for the same in full thereof, or give further time for payment of the same monies, or shall or may sign the certificate of any person or persons indebted to the said [*debtor*], and who is, are, or shall or may become bankrupt. And it is hereby further declared and agreed, that, in case any dispute, doubt, or difficulty shall arise between the said trustees or trustee, and any creditor or creditors of the said [*debtor*], who have executed or shall execute these presents, then and in that case, the full and exclusive power of determining the same respectively shall be referred to such person or persons as the said trustee or trustees for the time being, on the one part, and the said creditor or creditors, on the other part, shall appoint for that purpose; and that the award and determination of the person or persons so appointed shall be final and conclusive on all persons entitled to any interest under these presents. *And further*, that the trustees or trustee for the time being shall or may employ the said [*debtor*], or any other person or persons, to assist in the management, sale, and disposition and collection of the produce of all or any of the property hereby vested in the same trustee or trustees; And also to settle the accounts of the said [*debtor*], and to collect the credits owing to the said [*debtor*], and to give or allow the said [*debtor*], or the other person or persons to be employed as aforesaid, such salary or compensation, or allowance by way of commission, as the said trustees or the trustee for the time being shall think reasonable; And in particular, that the trustees or trus-

Power to trustees to admit the claims of creditors.

—To compound for any of the credits.

—To sign the certificate of any bankrupt.

—Reference of disputes to arbitration.

Power to the trustees to employ the debtor, or any other person, in winding up the affairs.

—And allow a proper salary.

tee for the time being shall or may employ any person or persons to act in the conduct and management of the said trusts, as far as respects property beyond the seas, and the sale, disposition, consignment, and remittance of the same, and the collection of credits, and the adjustment of any claims arising out of any question whether any other person or persons whomsoever is or are a partner or partners with the said [*debtor*] And shall and may, if the said trustees or trustee shall think proper, give and allow to the said [*debtor*] any allowance out of his effects, not exceeding what he would have been entitled to receive under a commission of bankruptcy, if certificated; And to give and confide to the person or persons so employed, or to any person or persons acting under him or them, or as his or their deputy or deputies, substitute or substitutes, such powers, authorities, and right of exercising a discretion, as the trustees or trustee for the time being shall think proper, without being answerable or responsible for the conduct of the person or persons so employed, or of his or their deputy or deputies, substitute or substitutes, or any loss which shall or may arise to the said trust estate by reason of any powers or authorities to be given as aforesaid; *And that* the trustees or trustee for the time being, if they or he shall think it expedient, shall or may, on account and at the risk of the said trust estate, give or procure bail for the said [*debtor*], to any action or actions in which the said [*debtor*] is or shall, during the continuance of the trusts hereby created, be arrested; and that the same trustees or trustee shall or may indemnify themselves and himself, and the person or persons who shall, at their or his request, become bail for the said [*debtor*], of and from all costs, damages, and expenses which he or they shall respectively incur by reason of becoming bail for the said [*debtor*]; *And also*, that, in case it shall be deemed expedient or advisable to bring or commence, or to defend any action or actions, or suit or suits at law or in equity, concerning the said trust tate, the said trustees or trustee for the time being shall or may exercise their or his discretion in commencing or defending the same; and shall and may retain all costs, charges, and expenses in anywise relating thereto, out of the money which shall be received by him and them by virtue of the trusts aforesaid. And it is hereby agreed and declared,

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Trustees may delegate their powers.

—May procure bail for debtor, at the risk of the estate.

Power to bring or defend actions.

Trustees' receipts to dis-

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charge purchasers.

that the receipts or receipt of the said trustees, or any or either of them, or their or his agent or attorney acting under them or him, for any sum or sums of money paid to them or him by any purchasers or other persons, by virtue of these presents, shall effectually discharge the persons paying the same from the necessity of inquiring into, and the liability to see to the application thereof.

Separate covenants by trustees, with one of the creditors,

And every of them the said [*trustees*], severally and apart from the other of them, doth hereby, for himself, his heirs, executors, and administrators, and as to and concerning only the acts, deeds, and defaults of himself, his executors, and administrators, covenant and agree with [A. B.], of ——, (one of the parties to these presents of the third part), his executors and administrators,

—To make a dividend when the money in hand is of a certain amount.

In trust for himself and themselves, and the several other persons, parties hereto of the third part, their executors and administrators, that the said [*trustees*] respectively, and their respective executors or administrators, shall and will, from time to time, as often as the money in hand shall amount to the sum of 500*l.*, or whenever two-thirds in number and value of the said creditors of the said [*debtor*], parties hereto of the third part, shall, by writing under their hands, require the said trustees to divide the money in hand, of whatever amount the same may be, make a dividend or dividends of all the money which shall have been received by them, any, or either of them, by virtue of these presents, unto and amongst themselves and all other the creditors of the said [*debtor*], who shall execute or accede to these presents, rateably and in the proportions aforesaid;

Monies in the mean time to be deposited in a bank.

And that the money which shall from time to time be received on account of the said trust estate, (when amounting to 100*l.* or upwards), and all bills and securities for money due or belonging to the same trust estate, shall be deposited in the names or name of the trustees or trustee for the time being, with Messrs. ——, bankers in London, or such other bankers or other persons as the said trustees or trustee for the time being shall for that purpose appoint.

Covenant by debtor with trustees, that he has made a full disclosure of his estate.

And the said [*debtor*] doth hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said [*trustees*], their executors, administrators, and assigns, that he the said [*debtor*] hath, at or before the time of executing these presents, made a true and faithful disclosure to the said [*trustees*] of all his estate, effects, and property, and that he hath not

withheld or embezzled any part or parts thereof; and that the books of account signed by the said [*debtor*], and delivered up to the said [*trustees*] or their agent at or before the time of the execution of these presents, do contain just and true accounts of all the estate and effects, and of all the debts and credits of the said [*debtor*], as far as it is in the power of the said [*debtor*] to make out such accounts; And that, if required, he will verify and attest the same accounts by an oath to be taken as aforesaid; And further, that he the said [*debtor*] shall and will, at all times hereafter, when thereunto required, make such discoveries and explanations of his said affairs as the trustees or trustee for the time being shall require; And shall aid and assist the said trustees or trustee for the time being in conducting and managing the concerns of the said trust estate, in such manner as to the said trustees or trustee shall seem reasonable. AND THIS INDENTURE FURTHER WITNESSETH, that, in consideration of the premises, they the said [*trustees*], and all and every other the creditors of the said [*debtor*], parties hereto (subject and without prejudice to the liens, claims, and securities hereinafter mentioned), do, and each and every of them doth by these presents grant unto the said [*debtor*], his heirs, executors, and administrators, that if the said trustees for the time being, or any two of them, shall at any time hereafter within three years from the day of the date of these presents, certify and declare by indorsement on these presents, that the said [*debtor*] hath conformed to their directions in ordering and assisting in the management of the said trusts, and hath conducted himself to their satisfaction, then and in that case the said [*debtor*], his heirs, executors, and administrators, shall immediately thereupon be absolutely released, and for ever discharged from all and singular the debts and sums of money whatsoever which are now due and owing, or secured or payable by or from the said [*debtor*] to the said creditors, upon or by virtue of any security or securities, or any undertaking, consideration, or account whatsoever, And also of and from all and all manner of actions, suits, proceedings, claims, and demands whatsoever, which they the said creditors, or any or either of them, now have or hath against the said [*debtor*] on any cause or account whatsoever antecedent to the date or execution of

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—And will verify same on oath.

—To explain his affairs to the trustees.

Further *testatum*.

Creditors grant to debtor, that, if the trustees shall certify by indorsement, that he has conformed, he shall be released.

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Proviso, vacating deed, if all the creditors do not execute by a certain day, and if trustees indorse a declaration on deed.

these presents. *Provided always*, and these presents are upon this condition, and it is hereby expressly declared and agreed, that unless all the just creditors of the said [*debtor*], whose respective claims amount to the sum of 30*l.*, shall within two calendar months from the date hereof, (except creditors beyond the seas, and with respect to them then within three calendar months from the date hereof), execute these presents and otherwise accede thereto, by agreeing to accept a dividend under the same, Then and in such case these presents and every thing herein contained, shall, if the said trustees or any two of them think fit, and shall make a declaration to that effect to be indorsed on these presents on or before the —— day of —— next, cease, determine, and become void to all intents and purposes whatsoever, any thing hereinbefore contained to the contrary thereof notwithstanding; And the said [*trustees*], and the survivors or survivor of them, his executors, or administrators, shall thereupon pay or assign and deliver to the said [*debtor*], his executors or administrators, all the said effects, trust-monies, and premises hereby assigned or intended so to be, or so much and such part thereof as shall not have been previously disposed of in pursuance of the trusts of these presents, first deducting their expenses as aforesaid, or shall pay and apply the same effects and money as the said [*debtor*], his executors or administrators, shall direct or appoint, and shall reinstate him in the same condition as he would have been if these presents had not been executed, or as near thereto or reasonably may be, and the existing circumstances will admit. AND THIS INDENTURE ALSO WITNESSETH, that, in consideration of the assignment hereby made by the said [*debtor*], and the covenants contained in these presents on his behalf, They the several persons parties hereto of the second and third parts, *Do*, and each and every of them *Doth*, by these presents, give and grant unto the said [*debtor*] for the term of three years, or which shall first happen, until the several persons parties hereto of the second part, or the survivors or survivor of them, or the executors or administrators of such survivor, or the major part of them, shall by a notice in writing to be indorsed on these presents, declare this license to be determined and at an end, or the said release hereinbefore con-

Letter of license for three years, determinable as after mentioned.

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tained shall come into operation, full and free liberty, license and safe conduct, power and authority to go about, attend to, and follow and negotiate any affairs, business, matters or things whatsoever, to or at any place or places whatsoever, without any let, suit, trouble, arrest, attachment, or other impediment to be offered or done to or against him the said [*debtor*], his wares, goods, monies, or other merchandize or effects whatsoever by them the said several persons parties hereto of the second and third parts, or any or either of them, their or any or either of their means or procurement; And every of them the said creditors, parties hereto of the second and third parts, Doth hereby grant for himself and herself, and his and her partners, and their respective heirs, executors, and administrators, that if he or she, or his or her executors, administrators, or partners shall molest or interfere with the person, goods, chattels, or effects of the said [*debtor*], contrary to the true intent and meaning of these presents, and during the continuance of the license hereby granted, then the said [*debtor*], his heirs, executors, and administrators, shall thenceforth be, and by these presents he and they is and are absolutely and for ever discharged from all actions, suits, claims, and demands both at law and in equity, of the creditor or creditors, by whom or by whose executors or administrators, or partner or partners, the said [*debtor*], or his estate and effects, or any part thereof, shall be so sued, arrested, prosecuted, and molested, attached, detained, taken in execution, or otherwise impeded or incumbered as aforesaid, at any time or times during the continuance of the license hereinbefore contained, and that these presents shall or may be pleaded in bar to such respective demands, and any prosecution, suit, action, attachment, arrest, or process whatsoever, that shall or may be in the meantime sued, brought, commenced, or prosecuted concerning the same demands against the said [*debtor*], his goods, chattels, and effects as aforesaid; *Provided further*, that in case these presents, and the trusts hereby declared shall not be determined under and by virtue of the provision hereinbefore contained, and any creditor or creditors of the said [*debtor*], or the executors or administrators of the same creditor or creditors, shall for the space of twenty-four hours after request in writing for that purpose

Covenant by creditors not to sue.

Creditor refusing to execute on request, to be excluded.

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to be given to the same creditor or creditors, his, her, or their executors or administrators, by the said [*debtor*], his executors or administrators, or his or their agent or attorney, refuse, neglect, or decline to execute these presents, and to accede to the same, then and in that case the creditor or creditors so refusing, neglecting, or declining, his, her, or their executors or administrators, shall be excluded of and from all benefit of or under any of the trusts hereinbefore expressed, declared, and contained; and the said [*debtor*], his executors or administrators, shall be entitled to stand in the place of the same creditor or creditors respectively, his, her, or their executors or administrators, and to have the same and the like benefit by way of dividend under the trusts hereinbefore declared as the same creditor or creditors respectively, his, her, or their executors or administrators, would have been entitled to have in case the same creditor or creditors, his, her, or their executors or administrators, had executed these presents; *Provided always*, and it is hereby also declared and agreed, that, notwithstanding any thing hereinbefore contained, any creditor or creditors who have or hath any specific lien or security, or several distinct securities for his, her, or their demand or demands, or any part thereof, or to the payment whereof any person or persons is or are liable as a surety or sureties for the said debtor, shall or may execute these presents without prejudice to the same security or securities, or to the claims against any surety or sureties as aforesaid, and with the consent of the trustees or trustee for the time being, shall or may convert the same security or securities into money, and receive a dividend rateably with the other creditors on so much of the same demand or demands as shall not be answered and paid out of the produce of the same security or securities; *Provided always*, and it is hereby further declared and agreed by and between the parties to these presents, That in case all or any, or either of them the said [*three trustees*], or any trustee or trustees to be appointed under this present provision in their, any, or either of their place, shall depart this life, or shall go to reside beyond the seas, or shall become unable or unwilling to act in the said trusts, Then and in that case, and as soon and as often as the same shall happen, it shall be lawful for the major part in value of the creditors of the said [*debtor*]

Collateral securities not to be prejudiced.

Power of appointing new trustees.

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who shall be present at any meeting or meetings to be convened by fourteen days' notice in the London Gazette, to nominate any fit person or persons to supply the place of the trustee or trustees respectively so dying, or going to reside beyond the seas, or becoming unable or unwilling to act as aforesaid, And that immediately after every such appointment, the trust-monies, property, and effects, which under and by virtue of these presents shall be or shall have been vested in such trustee or trustees, and shall then be subject to the trusts of these presents, shall be conveyed, assigned, and transferred, so and in such manner that the same may vest in such new trustee or trustees jointly with the surviving or continuing trustee, or solely, as the case may require, and in his, her, or their executors, administrators, and assigns, Upon the trusts hereinbefore declared concerning the same; And that every such new trustee, either before or after such conveyance or assignment shall be made or executed, shall have and may exercise the same powers, privileges, and authorities of giving effectual receipts, and all other powers and authorities whatsoever, as if he had been appointed a trustee by these presents, and as if his name had been inserted in these presents instead of the name of the trustee hereby appointed, in or to whose place such new trustee respectively shall come or succeed; And that this power shall extend to the freehold trust estate so vested in the said [*trustees*] as aforesaid; And it is hereby further declared and agreed, That the said several trustees for the time being shall be charged and chargeable only for such monies as the same trustee and trustees respectively shall actually receive by virtue of the trusts hereby reposed in him or them, notwithstanding his or their or any of their joining in any receipt or receipts for sake of conformity; And that any one or more of them shall not be answerable or accountable for the acts, receipts, neglects, or defaults of the others or other of them; And that he, they, or any of them shall not be answerable or accountable for any banker, goldsmith, broker, or other person with whom or in whose hands any part of the said trust-monies shall or may be deposited for safe custody, or otherwise in the execution of the trusts hereinbefore

Indemnity to trustees (*c*).

(*c*) But, as to such indemnities, *vide ante*, 361.

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contained, nor for any other misfortune, loss, or damage which may happen in the execution of the aforesaid trusts, or in relation thereto, except the same shall happen by or through his or their own wilful default respectively; and then and in that case, each person shall singly and alone be answerable for such loss or damage as shall arise from his or her own default; *And also*, that it shall be lawful for the trustees or trustee for the time being, by and out of the money which shall come to his or their respective hands by virtue of the trusts aforesaid, to deduct and retain to himself and themselves respectively, and also to allow to each other all costs, charges, damages, expenses, and fees to counsel for advice, which he, they, or any of them shall or may expend, disburse, or be put unto, in or about the execution of the aforesaid trusts, or in relation thereto, and also to settle, adjust, and allow the accounts of any trustee or trustees who shall depart this life, or shall retire from the aforesaid trusts, under the power in that behalf hereinbefore contained. PROVIDED ALWAYS, and it is hereby agreed and declared, that in case any doubt or question shall arise in the management, regulation, or conduct of the affairs of the said [*debtor*], which is not expressly or clearly and distinctly provided for by these presents, or in case the trustees for the time being shall not be able to agree on the line of conduct to be pursued by them in the management, conduct, and regulation of the same trusts, then and in such case it shall be lawful for the said [*trustees*], or the trustees or trustee for the time being under these presents, to call a meeting of the creditors of the said [*debtor*] by fourteen days' notice in the London Gazette, and to submit such doubt or question to the consideration of the said creditors who may be present at such meeting, whose determination respecting such matters, which may be so submitted to them, shall be binding and conclusive on all persons entitled to any benefit under the trusts hereinbefore declared, and the same trusts shall be managed and conducted accordingly; AND each and every of the creditors, parties hereto of the third part, severally, separate and apart from the others of them, doth hereby for himself and herself respectively, and his and her respective heirs, executors, and administrators, and as to and concerning only the acts, deeds, and defaults of himself and herself respectively, and his and her respec-

In case of difficulty, creditors to be convened.

Covenant by creditors to indemnify the trustees against loss.

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tive heirs, executors, administrators, and partners, covenant with the said [*trustees*], their executors and administrators, that in case any trustee, or any one or more of the said trustees for the time being, his or their heirs, executors, or administrators, shall sustain or incur any losses, costs, damages, or expenses by reason of the acceptance of the trusts hereinbefore contained, or any act relating thereto, then and in that case each of the said creditors, parties to these presents of the third part, his or her heirs, executors, administrators, or partners, when thereunto required by the trustee or trustees for the time being, his or her heirs, executors, or administrators, shall or will answer and pay to the trustee or trustees for the time being, his or their heirs, executors, or administrators, such sum or sums of money as shall be the proportion of each of the same creditors respectively of the same losses, costs, damages, and expenses, and that such proportion shall be estimated by the full amount of all the demands of the creditors respectively, including the demands of the said trustees who are or shall become parties to these presents, by executing or acceding to the same, and for which no mortgage or specific security is held by the same creditors, so that such creditor so executing or acceding to these presents, his or her executors or administrators, shall contribute in proportion to his or her demand respectively, when compared with the full amount of the demands of all the creditors, including the said trustees who shall execute or accede to these presents (except as aforesaid). IN WITNESS, &c.

As to the power of clergymen to charge their benefices.

Among the precedents collected by the late Mr. Bythewood were many deeds for securing the debts of clergymen by charges on their benefices; but they have not been inserted because recent decisions have shewn the futility of any attempt of this nature, the act of 13 Eliz. c. 20, stated *ante*, Vol. 2, p. 250, being revived so far as respects the charging of benefices by the stat. 57 Geo. 3, c. 99. Thus, in the case of *Shaw* v. *Pritchard*, 10 Barn. & Cress. 241, it was held, that a demise by a clergyman of his benefice for securing an annuity made since the latter statute was void; and in the still later case of *Flight* v. *Salter*, 1 Barn. & Adolph. 673, it was decided, on the principle that a person shall not do indirectly what he cannot do directly, that a warrant of attorney given by a clergyman for securing an annuity, to the intent that a sequestration might be obtained, was also void.

OF JOINT AND SEPARATE ESTATES OF PARTNERS.

ASSIGNMENT *of the* JOINT *and* SEPARATE ESTATES *of three* PARTNERS *engaged in a large Business as Clothiers, (including the Produce of Estates conveyed by separate Deeds), upon Trust for* SALE *and* CONVERSION, *for the* BENEFIT *of their* JOINT *and* SEPARATE CREDITORS. *The separate Debts of the respective Partners being insufficient to ground a Commission of Bankrupt upon, the separate Creditors are not made Parties.* POWER *to the Trustees to* CARRY *on the* BUSINESS *for a* CERTAIN PERIOD, *and* USUAL CLAUSES. *(Variation where the separate Debts being considerable, the separate Creditors are made Parties).*

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*debtors*], of &c., of the first part; [*five trustees*], of &c., of the second part; and the persons and bodies corporate (*a*) whose names are set forth in the schedule hereunder written, and whose names and seals are hereunto subscribed and affixed by themselves and their respective directors, trustees, partners, agents, or attornies, being creditors upon the copartnership stock or joint fund of the said [*debtors*], of the third part (*b*). WHEREAS the said [*debtors*]

Recitals of carrying on trade.

(*a*) As the Bank of England, East India Company, &c.

(*b*) If the separate creditors are made parties, the several classes of creditors will be distinguished thus:—

Variation, where the separate creditors are made parties.

" the several other persons whose names are set forth in the schedule hereunder written, intitled " The First Schedule," and whose hands and seals are hereunto subscribed and affixed, being creditors upon the copartnership stock or joint fund of the said [*debtors*], of the third part; the several other persons whose names are set forth in the schedule hereunder written, intitled " The Second Schedule," and whose hands and

have for several years carried on the trade or business of clothiers, at ——, under the firm of [A. B. & Co.]; and in the course of their said trade and dealings they became and now stand indebted to the several persons and bodies corporate parties hereto of the third part, in the several sums of money set opposite to their respective names in the schedule hereunder written, but the separate debts of the said [*debtors*], respectively, independently of the said copartnership, are inconsiderable in amount. And whereas the capital stock and property of or belonging to them the said [*debtors*] in copartnership, on their joint account, consist of the following particulars, that is to say, several leasehold premises, situate in —— and —— respectively, comprised in certain indentures of lease respectively dated the —— day of —— and —— day of ——; And also divers steam engines, mills, machinery, implements, and utensils of trade, horses, carts, and other live and dead stock; And also certain letters patent for the invention of machines or instruments for *(state invention)*, and also divers credits, cash, and other property. And whereas the said [*debtors*], being unable to pay the whole of the debts due and owing by them upon their joint copartnership account, have proposed to their said joint creditors to transfer and assign all and singular the estate, property, credits, and effects belonging to them the said [*debtors*], upon their joint copartnership account, unto the said parties hereto of the second part, their executors, administrators, and assigns, In trust for the joint creditors of the said [*debtors*], parties hereto of the third part, in manner hereinafter mentioned. And whereas the separate property of the said [*first partner*] consists of the following particulars, that is to say, a legacy or sum of 1500*l.*, bequeathed to him by [*testator*], late of ——, deceased; And also certain carriages and horses, furniture, and other effects in and about the dwelling-house of the said [*first partner*], at —— aforesaid; And also, 4000*l.* Three Pounds *per cent.* Consolidated Bank Annuities, and 1000*l.* East India

OF JOINT AND SEPARATE ESTATES OF PARTNERS.

Joint stock.

—Agreement for composition.

Particulars of which the separate estates of the partners are composed.

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seals are hereunto subscribed and affixed, being the separate creditors of the said [*first partner*], of the fourth part;" *(and so on as to the creditors of the other partners).*

OF JOINT AND SEPARATE ESTATES OF PARTNERS.

Stock. And whereas the separate property of the said [*second partner*] consists of forty shares in the Thames and Severn Canal Navigation; And also, certain carriages and horses, furniture, and other effects, in and about his dwelling-house, at —— aforesaid; And the separate estate of the said [*third partner*] consists of two saddle horses, and a few articles of furniture, and a small freehold estate, situate at ——. And whereas the said [*debtors*] have also proposed to the joint creditors to transfer and assure their respective separate estates to the said parties hereto of the second part, their executors, administrators, and assigns, In trust, as to the separate estates of each of them the said [*debtors*], for his separate creditors, in the first instance; and, after payment and satisfaction of his separate debts, for the benefit, in the next place, of the joint creditors of the said copartnership concern, parties hereto; to which proposal so made by the said [*debtors*], their said joint creditors, parties hereto, have consented; And in consideration of the assignment and assurances so agreed to be made by the said [*debtors*], of their said joint and separate estates as aforesaid, they the said creditors, parties hereto, have agreed to grant unto the said [*debtors*] respectively, such license, and to enter into such agreements as are hereinafter contained. And whereas, in pursuance of the said recited proposal, and in order to carry the same more effectually into execution, by indenture bearing date the day next before the day of the date of these presents, and made between the said [*debtors*], of the one part, and the said [*trustees*], of the other part, the leasehold premises comprised in the said indentures of lease of the —— day of —— and the —— day of ——, are respectively assigned by the said [*debtors*] unto the said [*trustees*], their executors, administrators, and assigns, during the respective terms, estates, and interests of the said [*debtors*] therein; And the said letters patent, and all steam and other engines, mills, and other buildings, made, set up, and erected by the said [*debtors*] in or upon the said leasehold premises, or which they or any of them may remove and take away from the said leasehold premises, and all other their copartnership stock and effects in or upon the said leasehold premises, are respectively bargained, sold, and assigned to the said [*trustees*], their executors, administrators, and assigns; Nevertheless, In trust to

Proposal to assign.

—Of conveyance of joint estate by indenture dated before the present deed.

OF JOINT AND SEPARATE ESTATES OF PARTNERS.

sell and dispose of the said leasehold and other premises, either by private sale or by public auction, and to receive the rents and profits thereof in the mean time, and until such sale; And to stand possessed of and interested in the monies to arise by such sale, In trust, in the first place, to pay and satisfy themselves the expenses of preparing for and making such sale or sales; and to stand possessed of the surplus of the monies to arise by such sale or sales, and to be received on account of the said rents and profits, In trust for the said [*debtors*], equally to be divided among them and their respective executors, administrators, and assigns; which said trust, for the payment of the said surplus monies to arise by such sale as aforesaid, were so declared by the said lastly recited indenture, in order and to the intent, that such surplus monies may be assigned by the said [*debtors*] respectively, in and by these presents, unto the said [*trustees*], their executors, administrators, and assigns, upon and for the trusts, intents, and purposes hereinafter expressed and declared of and concerning the same. AND WHEREAS, in further pursuance of the said recited agreement, and for carrying the same more effectually into execution, by indenture bearing date the day next before the day of the date of these presents, and made between the said [*first partner*], of the one part, and the said [*trustees*], of the other part, the said legacy of 1500*l.*, being the separate estate of the said [*first partner*], And by indentures of lease and release, the lease bearing date the day before the release, and the release bearing date the day next before the day of the date of these presents, and made between the said [*third partner*], of the one part, and the said [*trustees*], of the other part, the said small freehold estate, at —— aforesaid, being the separate property of the said [*third partner*], were respectively released, assigned, and assured unto the said [*trustees*], their heirs, executors, administrators, and assigns respectively, in trust to receive or sell the said legacy, as might be deemed expedient, and to sell the said freehold hereditaments by public sale or by private contract, and to stand possessed of the surplus of the monies to arise by such sale, and the intermediate interest and rents respectively, after satisfying the expenses of preparing for and making such sales, In trust for them the said [*first partner*] and [*second partner*] respectively, and

—Of conveyance of the separate estates of the several partners.

OF JOINT AND SEPARATE ESTATES OF PARTNERS.

their respective executors, administrators, and assigns, as their respective separate personal estates; which said trusts for the benefit of the said [*first partner*] and [*third partner*] respectively, were so declared by the said lastly recited indentures, to the intent that the monies to arise from their respective separate estates, after payment of the expenses of preparing for and making such sales respectively, may be assigned by them respectively, by these presents, unto the said [*trustees*], their executors, administrators, and assigns, upon and for the trusts, intents, and purposes hereinafter declared concerning the same. AND WHEREAS, in further pursuance of the said recited agreement, and for more effectually carrying the same into execution, the said [*second partner*], pursuant to the directions of, and the forms prescribed by, an act of Parliament passed in the twenty-third year of his late Majesty King George the Third, intituled "An act for making and maintaining a navigable canal from the river Thames or Isis, at or near Leach Lade," hath transferred the aforesaid forty shares in the said Thames and Severn Canal Navigation, unto the said [*trustees*], their executors, administrators, and assigns; which transfer was made to the intent that the said [*trustees*], their executors, administrators, and assigns, may stand possessed of and interested in the said shares respectively, upon and for the trusts, intents, and purposes hereinafter declared concerning the same. AND WHEREAS it is intended that the said sums of 4000*l.* Three Pounds *per cent.* Consolidated Annuities, and 1000*l.* East India Stock, being respectively parts of the separate estate of the said [*first partner*], as aforesaid, shall, as soon as may be after the execution of these presents, be sold by the said [*one of the trustees*], by virtue of certain letters of attorney to him for that purpose already given by the said [*first partner*]; And the monies which shall arise by sale thereof, and of any dividend or dividends due thereupon respectively, shall be paid by the said [*trustee*] into the hands of Messrs. [*bankers*], bankers in London, to the joint account and in the joint names of them the said [*trustees*], for the purpose of being applied by them upon the trusts hereinafter mentioned. AND WHEREAS it is not intended by the said parties hereto, that the leasehold premises comprised in the said recited indentures of lease of the —— day of —— and —— day of ——

Transfer of navigation shares recited.

Intended sale of stock in the funds belonging to one of the partners.

That an immediate sale is not intended, but trustees shall conduct the concern as after-mentioned.

OF JOINT AND SEPARATE ESTATES OF PARTNERS.

aforesaid, and the aforesaid letters patent, steam and other engines, mills, buildings, copartnership stock and effects, being part of the joint property of the said copartnership, and so assigned by the said first recited indenture, bearing date the day next before the day of the date hereof, should be immediately sold, notwithstanding the trusts declared for the sale thereof in and by the same indenture assigning the same; it being the intention of the said parties hereto, that the sale thereof should be postponed, for the purpose of enabling the said trustees to carry on the said trade or business of clothiers, for the benefit of the creditors of the said joint concern, during the time, and in the manner, and with the powers hereinafter mentioned and contained. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said recited proposal respecting the separate estate of the said [*first partner*], and in consideration of the premises, and *(nominal consideration)*, he the said [*first partner*] *Doth* by these presents bargain, sell, assign, transfer, and set over unto the said [*trustees*], their executors, administrators, and assigns, All and singular the monies to arise by the receipt, recovery, or sale of the said legacy or sum of 1500*l.*, bequeathed to the said [*first partner*] as aforesaid, and the interest thereof; And also, all and singular carriages, horses, household furniture, and other personal estate, which the said [*first partner*] is possessed of or entitled to, for his own separate use, independently of the said copartnership concern, and not assigned by him by the said recited indenture bearing date the day next before the day of the date hereof as aforesaid; And all the right, title, property, claim, and demand whatsoever, of the said [*first partner*], in, to, and out of the same premises; Together with all powers, remedies, and means whatsoever, necessary or requisite for suing for, recovering, receiving, renewing, and giving effectual releases and discharges for the same premises respectively, or any of them, either in the name of the said [*first partner*], his executors or administrators, or otherwise howsoever (*c*), TO HAVE, RECEIVE, AND TAKE the

Testatum.

Assignment of the separate estate of the first partner.

Habendum.

(*c*) As no part of the separate estate consists of credits, a letter of attorney to bring actions in the name of the assignor, is not introduced. With respect to bills of exchange and promissory notes, no such authority is necessary, as they are assignable *at law* by indorsement.

OF JOINT AND SEPARATE ESTATES OF PARTNERS.

said monies, personal estate, and premises hereinbefore expressed to be hereby assigned, unto the said [*trustees*], their executors, administrators, and assigns. And it is hereby agreed and declared, that they the said [*trustees*], or the survivors or survivor of them, or the executors or administrators of such survivor, shall and do forthwith, as soon as may be, absolutely sell and dispose of such part or parts of the premises hereinbefore assigned, being the separate estate of the said [*first partner*], as is or are of a saleable or disposable nature, either together or separately, or in parcels, by public sale or by private contract, and to any person or persons whomsoever, in such manner as to them or him shall seem proper, with power (if it shall be deemed expedient,) to purchase in any part or parts of the said trust premises, at any auction or auctions, and re-sell the same at any future auction, or by private contract, without being liable for any loss occasioned thereby; And also, to vary the terms of, or rescind any contract for sale that shall have been entered into; And shall and do make, do, and execute all such acts, matters, things, deeds, transfers, and assurances as shall be necessary or proper to effect such sale and disposition; And shall and do receive, collect, and get in all sums of money now due and owing to the said [*first partner*], upon his separate account; And shall and do convert into money all other the premises hereinbefore assigned, being the separate estate of the said [*first partner*]. And it is hereby agreed and declared, that they the said [*trustees*], and the survivors and survivor of them, and the executors and administrators of such survivor, shall and do stand possessed of and interested in the monies to arise by receipt, recovery, or sale of the said legacy of 1500*l.*, and of the interest thereof, And of and in all other the personal estate and premises hereinbefore expressed to be hereby assigned, being the separate estate of the said [*first partner*], And also of and in the monies to arise by the sale, disposition, and conversion thereof, after thereout pa ying and satisfying the expenses of preparing for and making, or otherwise attending such sale, disposition, and conversion, and also of and in the several sums of money which shall arise by the sale of the said 3*l. per cent.* Consolidated Annuities and East India Stock, and any dividend or dividends thereon, Upon and for the trusts, intents, and purposes

Trust for sale and conversion as to the separate estate of first partner.

Declaration of trust, as to the monies arising by the several means aforesaid.

following, (that is to say), *In trust*, by, with, and out of such monies to pay and satisfy the several debts and sums of money due and owing to the separate creditors of the said [*first partner*] (*d*), or so much of such separate debts as the monies and premises being the separate estate of the said [*first partner*] will extend to pay, by an equal pound rate according to the amount of the said several separate debts of the said [*first partner*], without any preference or priority of payment whatsoever; And in case there shall be any surplus of the said separate estate of the said [*first partner*], after payment of his said separate creditors, Then, as for and concerning such surplus monies and estate, Upon such trusts as are hereinafter declared, for the benefit of the joint creditors of the [*debtors*], concerning the joint copartnership property; *And in trust* to pay the ultimate surplus, if any, arising or to be produced from or by the said separate estate of the said [*first partner*], after full payment and satisfaction of the several debts due and owing to his separate creditors, and to the said joint creditors parties hereto, unto the said [*first partner*], his executors, administrators, or assigns. *(The separate estates of the other two partners are then assigned to the trustees, with a similar declaration of trust*, mutatis mutandis). AND THIS INDENTURE FURTHER WITNESSETH, that, in pursuance of the said recited proposal respecting the joint property of the said copartnership, and for the more effectually carrying the same into execution, And in consideration of the premises, and *(nominal consideration)*, They the said [*debtors*], at the request and by the direction of their joint creditors, parties hereto, *Do*, and every of them *Doth*, by these presents, bargain, sell, assign, transfer, and set over unto the said [*trustees*], their executors, administrators, and assigns, *All and singular* the monies to arise by the sale or from the intermediate rents and profits of the said leasehold premises comprised in the said indentures of lease hereinbefore mentioned, respectively dated the —— day of ——, and —— day of

OF JOINT AND SEPARATE ESTATES OF PARTNERS.

Trust for payment of separate creditors.

Surplus for joint creditors.

Ultimate trust for the debtor himself.

Further *testatum*.

All the partners assign the monies to arise from the previous deeds, and the other joint estate.

(*d*) If the separate creditors are parties, as suggested *ante*, p. 586, add here—

"parties hereto of the fourth part, and which, in the second schedule hereunder written, are set opposite to their respective names."

OF JOINT AND SEPARATE ESTATES OF PARTNERS.

——, and of the letters patent, steam, and other engines, mills, buildings, copartnership stock and effects respectively assigned to the said [*trustees*] by the said [*debtors*], as aforesaid, after payment of the costs and expenses of preparing for and making such respective sales; And also, all and singular the goods, wares, and merchandizes, monies, credits, bills, bonds, notes, and other securities for money, stock in trade, chattels, and personal estate whatsoever and wheresoever, which they the said [*debtors*], or any of them, are or is possessed of, interested in, or entitled to upon their joint or copartnership account, and not assigned by them by the said indenture bearing date the day next before the day of the date hereof as aforesaid, Together with all books of account, vouchers, and all other papers and writings in anywise touching or concerning the said lastly hereby assigned premises, or any of them; And all the right, interest, property, claim, and demand of them the said [*debtors*], and every of them, in, to, and out of the same premises; To HAVE, TAKE, AND RECEIVE the said monies, and all and singular other the premises lastly hereby assigned, or expressed and intended so to be, unto the said [*trustees*], their executors, administrators, and assigns: And, for facilitating the execution of the trusts hereby created, the said [*debtors*] *Do*, and each of them *Doth* hereby nominate and appoint the said [*trustees*], and the survivors and survivor of them, and the executors or administrators of such survivor, to be the true and lawful attornies and attorney irrevocable of them the said [*debtors*], and the survivors and survivor of them, his executors or administrators, in their or his names or name and stead, or otherwise, but upon the trusts hereinafter declared, and at the expense of the said trust estate, to commence, prosecute, or carry on any action or actions, suit or suits, at law or in equity, or other proceedings for recovering or compelling payment of all or any sum or sums of money or credits, due, owing, or belonging to them the said [*debtors*], as such copartners as aforesaid, and the same action or actions, suit or suits, either to prosecute and carry on to judgment and execution, or to discontinue, as the said attornies or attorney shall from time to time think fit or be advised, and, for the purposes aforesaid, to nominate and appoint one or more attorney or attornies under them or him, and the same nomination at pleasure to

Books of account, &c.

And all the right, &c.

Habendum.

Letter of attorney.

OF JOINT AND SEPARATE ESTATES OF PARTNERS.

revoke, and to appoint another or others in his or their place and stead; they the said [*debtors*] respectively hereby ratifying and confirming whatsoever the said [*trustees*], or the survivors or survivor of them, or the executors or administrators of such survivor, or their or his substitute or substitutes, shall lawfully do, or cause to be done in the premises by virtue of these presents. And it is hereby agreed and declared, that the sale of the said leasehold premises comprised in the said indentures of lease respectively, dated the —— day of ——, and —— day of ——, or such of them, and such parts thereof respectively, as shall be necessary to carry on the said joint trade and concern, and also the sale of the said letters patent, steam and other engines, mills, buildings, copartnership stock and effects so assigned as aforesaid, or of such of them as shall be necessary to carry on the said joint trade or concern, shall be postponed for the period of three calendar months, to be computed from the day of the date of these presents, or for such further time as the said joint creditors, or the major part of them in value, to be present at any meeting to be called as hereinafter mentioned, shall order or direct; PROVIDED ALWAYS, that it shall be lawful for the said joint creditors, or the major part of them in value, to be present at any such meeting as aforesaid, to order the sale of the said lastly mentioned leasehold premises at any time previously to the termination of the said three calendar months. AND it is hereby further agreed, that the sale of such of the said leasehold premises lastly mentioned, being the joint property of the said copartnership, as shall not be necessary to carry on the said trade or concern, shall be made as soon as conveniently can be after the execution of these presents; And that they the said [*trustees*], or the survivors or survivor of them, and the executors or administrators of such survivor, shall and do forthwith, as soon as conveniently may be after the execution of these presents, receive, collect, and get in all credits and sums of money now due and owing to the said joint trade and concern, or to the said partners in respect thereof; And also sell and convert into money all such and so much of the said copartnership estate and effects (not being credits and monies as aforesaid) as shall not be necessary to be kept unsold for the purpose of enabling the said trustees or trustee

Sale to be postponed for three months,

or for such further time as creditors shall direct.

May be sold before if the creditors shall order.

Trustees to sell what shall not be required to carry on the concern.

—To collect the credits.

OF JOINT AND SEPARATE ESTATES OF PARTNERS.

for the time being to carry on the said joint trade and concern; *And upon further trust*, that they the said [*trustees*], or the survivors or survivor of them, or the executors or administrators of such survivor, shall and do at the expiration of the said term of three calendar months, to be computed from the date hereof, or at such other time as the said joint creditors, parties hereto, or the major part of them in value, present at any such meeting as aforesaid, shall order or direct, absolutely sell and dispose of and convert into money all such and so much of the premises lastly hereby assigned, or intended so to be, not being monies, as shall be necessary and used by the said trustees or trustee for the time being in carrying on the said trade or business as hereinafter mentioned, either together or in parcels, or by public sale or private contract, to any person or persons whomsoever, in such manner as they the said trustees or trustee for the time being shall think proper, with power (if it shall be deemed expedient) to purchase in any part or parts of the said trust premises, at any auction or auctions, and resell the same at any future auction or by private contract, without being liable for any loss occasioned thereby; and also, to vary the terms of, or rescind any contract for sale that shall have been entered into. AND it is hereby agreed and declared, That they the said [*trustees*], and the survivors and survivor of them, and the executors and administrators of such survivor, shall and do stand possessed of and interested in the monies to arise by the sale of, and to be produced from all and singular the joint estate, property, stock, and effects of the said copartnership, after paying and satisfying the expenses of preparing for and attending such sales and conversions thereof, Upon and for the trusts, intents, and purposes hereinafter expressed and declared of and concerning the same; AND it is hereby agreed and declared, that it shall be lawful for the said [*trustees*], and the survivors and survivor of them, and the executors and administrators of such survivor, and they and he are and is hereby empowered, from time to time, until the whole of the said joint property, stock, and effects shall be sold and converted into money, to carry on and manage the said trade of clothiers in the names of the said [A. B. & Co.], or otherwise as they the said trustees or trustee for the time being shall think proper in and upon

—To sell the residue at the expiration of three months.

Trustees to stand possessed of the monies arising by the means aforesaid, upon the trusts after declared.

Power for the trustees to carry on the concern.

the said leasehold premises in ——, or such of them as they shall think proper, and to use and employ in the said trade or business the capital and joint stock of the said copartnership, or so much thereof as they shall think proper; *And also*, if they the said trustees or trustee for the time being shall think proper, to employ the said [*debtors*], or any or either of them to assist them the said trustees or trustee for the time being in carrying on the said trade or business, and in collecting the credits of the said copartnership, or otherwise in acting in regard to the said trade or business, and in the execution of the trusts hereby created, as they the said trustees or trustee for the time being shall think proper; *And also*, to allow the said [*debtors*] respectively, or such of them as shall be so employed as aforesaid, such salaries or allowances as the said trustees or trustee shall in their or his discretion think proper, and also to hire and employ all such other persons as clerks, servants, workmen, agents, and in other capacities, as they the said trustees or trustee for the time being shall think advisable to hire or employ in or about the said trade or business, and the carrying on the same, and otherwise in and about the execution and performance of the trusts hereby created, and to allow and pay such salaries, wages, or hire, to or for such person or persons respectively, as they the said trustees or trustee for the time being shall think proper; And as for and concerning as well the monies to arise from the sale of, or otherwise to be produced from the said joint copartnership estate, stock, property, and effects, as also the gains and profits to arise from the said trade or business so to be carried on by the said trustees or trustee for the time being during such time as the same shall be carried on by them; It is hereby agreed and declared, that the said [*trustees*], and the survivors and survivor of them, and the executors or administrators of such survivor, shall and do stand possessed thereof respectively, upon and for the trusts, intents, and purposes following, that is to say, *In trust*, in the first place, by, with, and out of the said trust-monies, to pay and satisfy the costs and expenses of preparing these presents, and the several other deeds and assurances made and executed or intended to be made and executed for the purpose of carrying into effect the arrangements so made by the said parties

OF JOINT AND SEPARATE ESTATES OF PARTNERS.

Power to trustees to employ debtors in carrying on business, collecting credits, &c.

—And to allow salaries.

Trustees to be possessed of the profits and all other the trust monies.

—In trust thereout, to pay the law expenses.

OF JOINT AND SEPARATE ESTATES OF PARTNERS.

hereto as aforesaid; And all other the expenses touching or concerning such arrangements which shall have been incurred previously to the execution of these presents; And in the next place, by, with, and out of such monies, to pay and satisfy the salaries, allowances, wages, and hire hereinbefore authorized to be allowed and paid by the said trustees or trustee for the time being, and all other the costs and expenses which the said trustees or trustee for the time being shall or may pay, sustain, bear, expend, or be put unto in carrying on the said trade or business, and in the execution of the trusts hereby created, And, subject to the trusts aforesaid, *In trust,* to pay and apply the said trust monies in and towards satisfaction and discharge of the several debts due and owing to the said joint creditors parties hereto, of the said [*debtors*], or of so much of the said debts as the said trust-monies, after such payments and deductions thereout as aforesaid, shall extend to pay (nevertheless, the same to be in full satisfaction of the whole of the said debts respectively), by an equal pound rate according to the amount of the said several debts, and without any preference or priority of payment whatsoever; And, in case there shall be any surplus of the said trust-monies, after full payment and satisfaction of all such costs, charges, salaries, wages, and expenses as aforesaid, and of the whole of the said joint debts of the said joint creditors, parties hereto, In trust (*e*), as to such surplus monies, for the said [*debtors*], equally to be divided among them, and their respective executors, admin-

—To pay wages, &c.

—Trustees' expenses.

—To pay the joint debts equally.

—To pay the surplus to the copartners equally.

(*e*) Where the circumstances of the joint and separate estates are such as to render it proper to provide for the event of there being a surplus of the joint, and a deficiency of the separate property, vary the recital as follows:—

One moiety of surplus to separate creditors of one party.

"as to one equal third part of such surplus monies in aid and augmentation of the separate estate of the said [*first partner*], and to be applied and disposed of upon and for the trusts, intents, and purposes hereinbefore expressed and declared of and concerning the monies to arise by the sale of the separate estate of the said [*first partner*], or upon and for such of them as shall be then subsisting and capable of taking effect; And *(so on as to the remaining partners according to their respective shares).*"

istrators, and assigns (*f*); *Provided always*, and it is hereby agreed and declared, that the naming of any of the said joint creditors, parties hereto, as trustees as aforesaid, shall not be construed to give them the said joint creditors, being trustees, or any of them, any right, preference, or priority of payment of the debts due to them or any of them; *(trustees' receipts to be good discharges, and no purchaser or purchasers to be bound to ascertain or inquire into the necessity or propriety of any such sale or sales, disposition or dispositions as aforesaid)*; And it is hereby agreed and declared, that it shall be lawful for any one or more of the said joint creditors, parties hereto, from time to time during the continuance of any of the trusts hereby declared, to call a meeting or meetings of the said joint creditors, parties hereto, at any place or places within or near the town of ——, of which meeting or meetings four days' notice in writing shall be given by the said creditor or creditors calling such meetings, to the other joint creditors, parties hereto, or their respective executors, administrators, or assigns, or left at their respective places of abode, or counting-houses, or sent to them respectively by the General Post, and also, as to such of the creditors, parties hereto, as are public companies, at the usual place or places of meeting of the directors or trustees of such companies respectively; And it is hereby also agreed and declared, that the majority in value of the creditors present at any such meeting, shall have full power to make such orders and directions, either for accelerating or postponing the sale of the said joint property, and otherwise touching or concerning the said trade or business and joint property, and the management thereof, and touching the commencement of any actions, suits, or prosecutions in respect of the said trust-premises, or any part or parts thereof, as they the said majority in value of the said joint creditors shall think proper, which orders and directions so to be made by the majority in value of the creditors present at any such meeting, shall be binding and conclusive upon the others of the said joint creditors. *Provided always*, that nothing in these presents contained shall authorize or empower the majority in value of the said joint creditors present at

OF JOINT AND SEPARATE ESTATES OF PARTNERS.

Trustees not to have priority.

Power to any one creditor to call a meeting.

Power of a majority of the creditors at a meeting, to bind the whole.

—But this power not to extend the variation of the trusts as to

(*f*) This supposes the partners' shares to be equal, and that none of them is debtor to or creditor upon the partnership.

OF JOINT AND SEPARATE ESTATES OF PARTNERS.

any such meeting, without the consent of all the others of the said joint creditors, to make any alteration or variation of the trusts hereinbefore declared, so far as the same trusts relate to or concern the application or division of the said trust-monies; And it is hereby further agreed and declared, that, with respect to copartners and public companies being joint creditors, parties hereto, any one partner in each copartnership, and any director or trustee of any such public company, shall at any such meeting be considered as representing the partnership firm or company to which he may happen to belong; And that, at each such public meeting, the vote or agreement of any such partner, director, or trustee, shall be binding and conclusive upon the said copartnership or public company. *Provided always*, and it is hereby agreed and declared, that the specifying any debt or debts in the schedule hereunder written shall not be conclusive between the parties hereto, or any of them, in respect either of the amount or the value of such debts respectively; but that it shall be lawful for the said [*trustees*], or the survivors or survivor of them, or the executors or administrators of such survivor, [and also for the said [*debtors*], or either of them, their, or any of their executors or administrators [*g*]], to call in question, litigate, or controvert the same or any part thereof, or to take any course or proceedings, at law or in equity, to have the same disallowed or otherwise liquidated or adjusted. *Provided always*, and it is hereby agreed and declared, that, when and as often as the money to be received by virtue of these presents, or under the trusts aforesaid, shall amount to the sum of £——, the same shall, from time to time, be paid into the banking-house of Messrs. ——, or into such other banking-house or houses as they the said trustees or trustee for the time being shall think proper, in the names or name of the trustees or trustee for the time being, acting under or in execution of the trusts hereby created; And that such trustees or trustee shall make a dividend or dividends of the monies which they shall have received from, by, or on account of the trust estate and premises, applicable to the payment of the said joint debts as aforesaid amongst the said several joint creditors, parties hereto, and their respective

the appropriation of the trust-monies.

Partners and directors to represent their firm and company.

Amount of the debts in the schedule not to be conclusive.

Trustees to deposit monies in a banking-house.

To make dividends.

(*g*) *Sed qu.* as to the clause in brackets?

executors, administrators, and assigns, according to the method and directions hereinbefore contained, from time to time, as often as there shall be sufficient in hand to pay —— in the pound on the amount of the several debts and sums of money for the payment of which the same shall, under the trusts aforesaid, be applicable, or oftener if such trustees or trustee for the time being shall be directed so to do by the major part in value of such of the creditors for the payment of whose debts such monies shall be so applicable, who shall be present at any meeting or meetings to be called from time to time, or at any time or times, as aforesaid. *Provided also*, and it is hereby agreed and declared, that no one of the said creditors shall be entitled to receive any dividend or dividends under or by virtue of these presents, until such time as such creditor, or, in the case of a public company or copartnership being creditors, a director or trustee of such company, or one of the said partners, shall have made an affidavit or affirmation before one of the Masters or a Master Extraordinary of the High Court of Chancery, or before some Justice of the Peace, if thereunto required by the trustees or trustee for the time being, that his, her, or their debt is then justly due and owing; and shall produce and deliver such affidavit or affirmation to the said trustees or trustee for the time being, or some or one of them. *Provided also*, that, in case the said [*debtors*], or any or either of their joint or separate estate, shall be arrested, attached, or troubled, by or on account of their said joint creditors, before all such creditors shall have executed these presents, then and in such case, and as often as the same shall happen, it shall be lawful for the trustees or trustee for the time being, or any of them, and they are hereby authorized and empowered to become or procure bail for them the said [*debtors*], or any or either of them, and to contest the debt or debts of any such creditor or creditors, if they the said trustees or trustee shall think proper; And then and in such case, they the said trustees or trustee for the time being, and such person or persons as they or he shall procure to become bail, as aforesaid, shall be paid, reimbursed, and indemnified out of the trust premises applicable to the payment thereof, under the trusts aforesaid, all and every such sum and sums of money, costs, charges, damages, and expenses, as they shall respectively pay, expend, or be put unto, for or on account

OF JOINT AND SEPARATE ESTATES OF PARTNERS.

No creditor to receive any dividend until his debt be proved on oath or affirmation, if required.

In case any of the partners shall be arrested, &c.,

trustees may give bail and defend the action;

and such bail shall be indemnified.

OF JOINT AND SEPARATE ESTATES OF PARTNERS.

or by consequence of their becoming or procuring such bail, and contesting such debt or debts as aforesaid. *Provided always*, and it is hereby agreed and declared, that the said

Trustees to produce accounts.

trustees or trustee for the time being shall and do produce and shew forth unto all and every or any of the creditors, parties to these presents, who shall desire the same, at or upon every or any meeting or meetings to be called, with such notice as aforesaid, a full, plain, and true statement and account in writing of all the transactions, matters, and things relating to the said trust estate and premises, or in anywise concerning the same. *Provided always*, and it is hereby further agreed and declared, that the trusts and provisions hereby made for the payment of the several debts as aforesaid, are so made upon this express condition, that the several creditors coming in and taking benefit under the said trusts and provisions hereby made, do agree to accept the same in full satisfaction of their respective claims and demands upon and against the said [*debtors*], and each and every of them, jointly and separately, but without prejudice to any security or securities from any other person or persons, as a surety or sureties, or otherwise, which such creditor or creditors may respectively have or possess (*h*). And the said

Creditors to accept the dividends in full for their debts.

—but without prejudice to claims against third persons.

(*h*) In a deed vesting the property of bankers in trustees for creditors, the following special clauses were inserted:—

Power to trustees to take notes and bills issued by the bank, in payment of debts.

Provided always, that it shall be lawful for the said trustees or trustee for the time being, at their or his discretion, to receive notes heretofore issued by the said [*debtors*], as copartners as aforesaid, called —— bank notes, or bills drawn, indorsed, or accepted by the said [*debtors*], which are due and unpaid, or shall not be paid when due, in payment or part payment of any debt or debts now owing to them the said [*debtors*], upon their partnership account.* *And further*, that it shall be lawful for the said trustees or trustee for the time being, in their or his discretion, and, if they or he shall see occasion, to pay to or for all or any of the creditors of the said [*debtors*], either jointly or separately, who, by reason of infancy or other disability, cannot

—To pay in full creditors who are disabled from coming in under the deed.

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* This provision, of course, would only be proper when the eventual solvency of the firm is unquestionable.

[*debtors*], for themselves severally, and for their respective heirs, executors, and administrators, do hereby severally co- OF JOINT AND SEPARATE ESTATES OF PARTNERS.

legally, or without a breach of trust, accede to these presents, so as to carry the same into effect according to the rules of law or equity, the full amount of the debts owing to the same creditors respectively; And also to appropriate and set apart the amount of the debts owing to such of the creditors of the said [*debtors*], as are resident in India, or in parts beyond the seas, and who shall not, before a final dividend shall be made of the produce of the said trust estates, accede to and execute these presents, either in person or by their agents or attornies having authority for that purpose; and finally, if it shall be deemed necessary, or expedient, to pay to such creditors respectively, either the full amount, or, as the case may require, any part of the money so appropriated, as to the trustees or trustee for the time being shall appear most advisable, with a view to the performance and finally closing the trust accounts; and, on making any dividend of the produce of the trust estate, to retain such sum or sums of money as shall be necessary to answer the full amount of the debts in respect of which such appropriation is to be made; but the balance or surplus (if any) of the money to be so appropriated, shall, after satisfying the debts of the creditors residing abroad, or so much of the same debts as the trustees or trustee for the time being shall think fit to satisfy, be applied in the same or the like manner as the residue of the produce of the said trust estates, subject nevertheless to the provision hereinafter contained."

—To appropriate debts owing to persons abroad.

The trustees (among other things) were empowered—

"to compromise, settle, and ascertain the amount of the debt or debts claimed by any creditor or creditors respectively, and also the fund on which the party or parties is or ought to be deemed a creditor and creditors; and also to separate, distinguish, and allot the separate property from the partnership property, according to the best of his or their judgment and discretion; And to settle, ascertain, and adjust the state of the accounts as between the partners, for the purpose of dividing the final residue or surplus between them or

—To settle the amount of claims by creditors, and upon what fund the same should be charged.

—And also to adjust claims of partners to the surplus.

OF JOINT AND SEPARATE ESTATES OF PARTNERS.

venant and agree with the said [*trustees*], their executors, administrators, and assigns, in manner following, (that is to say),

---

their representatives; And also to convey any of the trust freehold estates, or assign and transfer securities to any of the creditors in satisfaction of their respective debts, as to the said trustees or trustee shall seem meet."

The following clauses were also added—

—To compound debts owing to the bankers.

" PROVIDED ALWAYS, and it is hereby declared and agreed, that the trustee or trustees for the time being shall or may, in his or their discretion, compound any debt or debts owing to the said [*debtors*], or any one or more of them, and accept part thereof as a security for the same in full thereof, or give further time for payment of the same debt or debts,

—To refrain from suing.

and shall have a discretionary power in refraining to sue for any debts which shall in his or their opinion be deemed bad or desperate, without being answerable for all or any part

—To sign certificate of bankrupt debtors.

of such debts; And shall and may sign a certificate of any person or persons indebted to the said [*debtors*], or any or either of them, and who is or are or shall or may become

—To make arrangements with persons holding securities.

bankrupt; And that the trustee or trustees for the time being shall or may make any arrangement which he or they shall deem reasonable, with any person or persons who do, or doth, or shall, or may hold any securities given by the said [*debtors*], or any or either of them severally, out of or upon any land or other property holden by them the said [*debtors*], or any or either of them, by way of security, or as a pledge for money, with the view or for the purpose of procuring the whole or any part of the lands or property comprised in any mortgage or security made by the said [*debtors*], or any or either of them, to be exonerated or released of and from the security so made or given by him or them thereon; so, nevertheless, as the trustees or trustee for the time being shall not pay or give any consideration or price for or upon such arrangement, beyond the amount or value of the principal monies and interest then due to the person or persons who doth, or do, or shall hold such securities, as claiming under the said [*debtors*], or any or either of them, and the incidental expenses attending such arrangement and

—To sell any

release. *And further*, that the said trustees or trustee for

that they the said [*debtors*] respectively shall and will, without delay, make a full and fair disclosure and discovery and delivery up (upon oath, if required), of all their joint and separate estate, unto the said [*trustees*], or the survivors or survivor of them, or the executors or administrators of such survivor, and shall not nor will conceal or secret any part or parts thereof; And that they the said [*debtors*] respectively, and their respective executors and administrators, shall and will, at all times hereafter, justify, ratify, and confirm all and whatsoever the said [*trustees*], their executors or administrators, or any of them, shall lawfully do or cause to be done in and about the premises; And that they the said [*debtors*], or any or either of them, their, or any or either of their executors or administrators, shall not nor will revoke

OF JOINT AND SEPARATE ESTATES OF PARTNERS.

—To make a a fair disclosure.

—To confirm the acts of the trustees.

—Not to revoke any of the powers.

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the time being, shall and may sell all or any part of the trust property for money to be paid at a future day, or on credit, or for security or securities by way of bills of exchange or otherwise, as the trustees or trustee for the time being shall think advantageous; And shall and may sell and convert into money all contingent interests and securities which cannot be immediately enforced with a prospect of advantage, and all debts which shall be deemed bad or doubtful, or which cannot be collected in a reasonable time, so as to enable the trustee or trustees for the time being finally to close the trust account at an early period; And that the trustees or trustee for the time being shall have full power and authority to adjust and settle with creditors entitled to have Bank annuities or other funded property, or Bank stock, or India stock, replaced, the terms and arrangements which to the said trustees or trustee for the time being shall appear most proper for bringing their debts to a fixed balance in money, and to carry such terms and arrangements into effect, by performing the same; And it is hereby further provided, declared, and agreed, that the trustees or trustee for the time being may, if they or he shall think fit, rent, hire, or take such house or counting-house, or other place, as they or he shall think proper, for carrying on the affairs of the trusts, at the expense of the trust estate, and employ the said [*debtors*], &c."

part of the trust property upon credit,

—also contingent interests, bad debts, &c. so as to enable them to close the account

—And to settle with creditors who are entitled to have stock replaced.

—To take a counting-house for the business of the trust.

OF JOINT AND SEPARATE ESTATES OF PARTNERS.

or make void all or any of the powers or authorities hereby given or to be given to the said [*trustees*], any or either of them, their, or any of their executors, administrators, or attornies, agents, or assigns; nor release, discharge, or compound for all or any of the debt or debts, sum or sums of money, or other the premises hereby or by the said recited indentures respectively mentioned to be conveyed or assigned as aforesaid; or sue for or intermeddle with the same or any part or parts thereof, nor do any thing whereby the recovery thereof, or any of them, or of any part or parcel thereof, may be impeded or delayed; nor disavow, discontinue, or become nonsuit in any action or suit to be brought, commenced, or prosecuted in respect thereof; nor otherwise act or interfere in or about the premises, further than the said [*trustees*], or the survivors or survivor of them, and the executors or administrators of such survivor, shall direct or require; And that they the said [*debtors*] respectively, or their respective executors or administrators, shall not nor will in anywise hinder or obstruct the said [*trustees*], or the survivors or survivor of them, or the executors or administrators of such survivor, or any of them, or any other trustees or trustee to be appointed as hereinafter mentioned, in the execution of any of the trusts hereinbefore mentioned or referred to; but shall and will, from time to time and at all times hereafter, aid and assist the said [*trustees*], and the survivors and survivor of them, and the executors or administrators of such survivor, and such other trustees and trustee, in the execution thereof, to the utmost of their and each and every of their power. [*Provided always*, and it is hereby agreed and declared, that any of the creditors of the said [*debtors*], or any or either of them, upon their joint account, shall be at liberty to execute these presents without prejudice to any other security or securities, or any claim or demand upon or against any other person or persons, as a surety or sureties, or otherwise, which he, she, or they may have for his, her, or their debt or debts, or any part thereof. *Provided always*, and it is hereby agreed and declared, that it shall be lawful for the said trustees or trustee for the time being, and they and he have and has hereby full power and authority, at their or his discretion, to compound, submit to arbitration, compromise, liquidate, settle, and agree with, and

—Nor compound debts.

—Nor discontinue any action.

—Nor obstruct the trustees.

Creditors to execute without prejudice to any other security.

Trustees may refer to arbitration.

discharge and exonerate any person or persons, for or in respect of any sum or sums of money, account or accounts, dealings or transactions, matters or things, wherein the said [*debtors*], or any or either of them, or the trustees or trustee for the time being, at any time or times hereafter, shall be in anywise concerned]. *(Power of appointing new trustees, as in former precedents).* *Provided always*, and it is hereby agreed and declared, that, in case all the joint and copartnership creditors of the said [*debtors*], whose debts respectively amount to upwards of £—— of lawful money of Great Britain, shall not, by themselves or their respective directors, trustees or partners, attornies or attorney, or agents thereunto authorized, duly execute these presents, or a duplicate thereof, or duly accede to the terms thereof, upon or before the —— day of —— next; or, in case any commission of bankrupt grounded on these presents or upon any other act done or committed by the said [*debtors*] or any of them previously to the date and execution of these presents, shall be issued out and prosecuted against the said [*debtors*] or any of them, at the suit or upon the petition of any of the said joint or separate creditors not having executed these presents; then and in either of the said cases, the present indenture, and every article, covenant, agreement, clause, matter, and thing herein contained, shall cease, determine, and be absolutely null and void. *(Usual indemnity clauses).* IN WITNESS, &c.

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